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James P. Hendon













**REPORTS**  
**OF**  
**C A S E S**  
**DECIDED IN THE**  
**HIGH COURT OF CHANCERY,**  
**BY THE RIGHT HONORABLE**  
**LORD CHANCELLOR COTTENHAM,**  
**LORD HIGH CHANCELLOR OF ENGLAND.**  
**WITH NOTES AND REFERENCES,**  
**TO BOTH ENGLISH AND AMERICAN DECISIONS.**

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**BY JOHN A. DUNLAP,**  
**COUNSELLOR AT LAW.**

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**VOL. XVIII.**

**CONTAINING MYLNE & CRAIG'S CHANCERY REPORTS, VOL. 4, AND CRAIG  
& PHILLIPS, VOL. 1.**

**1838, 1839, 1840, 1841.—2, 3 & 4 VICTORIA.**

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**1847.**



**REPORTS**  
**OF**  
**C A S E S**  
**ARGUED AND DETERMINED**  
**IN THE**  
**HIGH COURT OF CHANCERY,**  
**DURING THE TIME OF**  
**LORD CHANCELLOR COTTENHAM.**

---

**BY J. W. MYLNE & R. D. CRAIG, ESQS.**  
**BARRISTERS AT LAW.**

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1847

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**LORD COTTENHAM, LORD CHANCELLOR.**

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**LORD LANGDALE, MASTER OF THE ROLLS.**

---

**SIR LANCELOT SHADWELL, VICE-CHANCELLOR.**

---

**SIR JOHN CAMPBELL, ATTORNEY GENERAL.**

---

**SIR ROBERT MONSEY ROLFE,      SIR THOMAS WILDE,  
SOLICITORS GENERAL.**

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## MEMORANDA.

In May, 1839, WILLIAM RUSSELL, Esq., Barrister at Law, was appointed Accountant General of the Court of Chancery, upon the resignation of WILLIAM GEORGE ADAM, Esq. who shortly afterwards died.

In Trinity Vacation, 1839, Sir WILLIAM HORNE, one of Her Majesty's Counsel, was appointed a Master in Chancery, upon the resignation of HENRY MARTIN, Esq., who soon afterwards died.

In Michaelmas Term, 1839, Sir WILLIAM HENRY MAULE, one of the Barons of the Court of Exchequer, was appointed one of the Judges of the Court of Common Pleas, upon the death of the Right Honorable Sir JOHN VAUGHAN; and Sir ROBERT MONSEY ROLFE, Her Majesty's Solicitor General, was appointed a Baron of the Court of Exchequer, in the place of Sir W. H. MAULE.

THOMAS WILDE, Esq., one of Her Majesty's Serjeants at Law, was appointed Solicitor General, in the place of Sir R. M. ROLFE, and was afterwards knighted.

In the Vacation after Hilary Term, 1840, ROBERT BAYNES ARMSTRONG, Esq., GEORGE JAMES TURNER, Esq., DAVID DUNDAS, Esq., and RICHARD BETHELL, Esq., were appointed Her Majesty's Counsel.

In the same Vacation, JAMES MANNING, Esq., JOHN HALCOMBE, Esq., WILLIAM FRY CHANNELL, Esq., WILLIAM SHEE, Esq., and DIGBY CAYLEY WRANGHAM, Esq., were called to the degree of Serjeants at Law; and, in the Vacation after Trinity Term, WILLIAM GLOVER, and STEPHEN GASELEE, Esquires, were called to the same degree.





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# REPORTS OF CASES

ARGUED AND DETERMINED IN

## THE HIGH COURT OF CHANCERY.

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*Between* THE ATTORNEY GENERAL, at the Relation of JOHN HAMPDEN THELWALL, and Others, Informant; *and* THE WARDENS AND COMMONALTY OF THE MYSTERY OF FISHMONGERS OF THE CITY OF LONDON, Defendants.

1838; July 18.

The court will not, upon an interlocutory application, after the cause is set down for hearing, declare that at the hearing a particular document may be produced and read as evidence.

A plaintiff applying for leave to amend, after replication, must give the court as much information as to the nature of the proposed amendments as the court requires upon an application for leave to amend a second time after answer.

Whether it is necessary, and if so, in what cases, to obtain the leave of the court before filing a supplemental bill for the purpose of putting in issue matter discovered since the original bill was susceptible of amendment, *quære*.

But if such leave is necessary, the application for it must give the court as much information as would be required for the purpose of obtaining leave to amend a second time after answer.

THE original information in this cause was filed on the 21st of November, 1833, and the answer to it was put in on the 31st of May, 1834. In the month of January, 1836, an amended information was filed, to which the answer was put in on the 23d of May, 1836. \*On the 4th of June, [\*2] 1838, after publication had passed, and the cause had been some time set down for hearing before the Master of the Rolls, the relators gave notice of a motion before his lordship for liberty to produce and read, at the hearing of the cause, as evidence, the will of Sir Thomas Kneseworth, dated the 4th of June, 1513, and proved in the Prerogative Court of the Archbishop of Canterbury on the 8th of August, 1513, although the same was not stated in the pleadings of the cause; or else for liberty to amend the information, or to file a supplemental information, by introducing the said will, and otherwise touching the same as counsel might advise; and that, in such case, the cause might stand over in the meantime, and until the same could be properly brought on for hearing.

An affidavit of James Bennell, filed in support of this motion, stated that

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the information was prepared from a report of the charity commissioners, which stated the charity arising under the will of Sir Thomas Kneseworth, dated the 13th of April, 1513, mentioned in the pleadings, and enrolled in the court of hustings of London; that, on searching at the prerogative office in Doctors' Commons, in the month of January, last, (1838,) to ascertain if the said will was proved there, and, if so proved, to have the same produced in court at the hearing of the cause, the deponent discovered, for the first time, that another will of Sir Thomas Kneseworth, dated the 4th of June, 1513, was proved in the Prerogative Court on the 8th of August, 1513, and which referred to the charitable gift to the defendants in his former will, being, as the deponent believed, the will in question in this cause. The deponent verified an official extract of the will proved in the Prerogative Court, and proceeded to state that he believed that in the returns made by the [\*3] defendants to the charity commissioners, and on which they made their report, the last-mentioned will was altogether omitted and suppressed, inasmuch as the same was not stated or noticed in such report, or in the defendants' answers in this cause. The deponent added that the cause now stood about the sixtieth in the Master of the Rolls' book of causes.

The affidavit of John David Towse, the clerk of the Fishmongers' Company, stated that, until informed, in the month of May, 1838, by a letter from the relators' solicitors, he was not—and he believed the defendants were not—aware that a will of Sir Thomas Kneseworth, dated the 4th of June, 1513, was proved in the Prerogative Court on the 8th of August, 1513; but that he had since caused that will to be examined, and that, upon examination thereof, it appeared that the property expressed to be therein devised formed no part of the property which was the subject of this suit, but that the same was wholly distinct from and in no wise connected with the subject matter of this suit, and that the property mentioned in such will was not now in the possession of the Fishmongers' Company. The deponent added that he had been in the office of the defendants upwards of sixty years, during which time he had frequently perused the records and muniments of the defendants, and that he never found any mention therein, or reference therefrom, of or to the alleged will of the 4th of June, 1513; and that, in the returns made by the defendants to the charity commissioners, and upon which they made their report to parliament, the last-mentioned will was not, by the defendants, their officers or agents, omitted or suppressed, inasmuch as the defendants, their officers and agents, were ignorant of the same being in existence; and that he believed that no notice or mention was made [\*4] in any of the company's books, of the said will, or of the property therein mentioned, or of the produce of the sale thereof, being or having ever been in the possession or power of the defendants.

Upon the motion, of which notice had been given, being made before the Master of the Rolls, his lordship refused to make such an order as was asked by it, and ordered the relators to pay the costs of the application; but direct-

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ed that the motion should stand over, with liberty to the relators to amend the notice of motion as they might be advised.

The relators now moved that the order of the Master of the Rolls might be discharged.

Mr. *Cooper*, in support of the motion, said that the nature of the amendments intended to be made, if leave to amend should be given, was sufficiently indicated by the notice of motion; and further, that if the court should not think the case one in which it would be right to permit an amendment of the information, leave to file a supplemental information would then be given; but that a supplemental information could not, under such circumstances as the present, be filed without the previous permission of the court. He referred to *Crompton v. Wombwell*(a) and *Colclough v. Evans*.(b) He admitted that the two wills related to distinct properties, but said that the second will clearly showed that the devise to the Fishmongers' Company contained in the first will was intended to be a devise for charitable purposes, a point which was in dispute in the cause.

Mr. *Wigram* and Mr. *Romilly*, *contra*.

\*THE LORD CHANCELLOR:—In this case an application was made [\*5] to the Master of the Rolls, upon a notice of motion, which asked that the relators might be at liberty to produce and read at the hearing of the cause, as evidence, the will of Sir Thomas Kneseworth, dated the 4th of June, 1513, and proved in the Prerogative Court in August, 1513, although the same is not stated in the pleadings of the cause. That is the first thing that was asked. Now it is very properly admitted that that was a very absurd application, as it was asking neither more nor less than this—that the court would, before the hearing of the cause, declare something to be evidence; whereas, if it be evidence, the party may use it; and if it be not evidence, the court cannot make it evidence by an interlocutory order. That part of the notice of motion has been very properly abandoned.

The next application is, “that the relators may be at liberty to amend their information in this cause, or to file a supplemental information by introducing the said will, and otherwise touching the same as counsel may advise;” the facts appearing to be, that the information having been filed in the year 1833, upon a will, the parties filing the information, not thinking it necessary to look further than the report of the charity commissioners, assumed that the will stated in that report was the only will. Perhaps it is no great wonder that they did not look for another will—finding there was one will—and perhaps there was not any very great want of caution in not going to the proper repository to see how far that will was correctly stated in the report. In January, last, however, the cause being in a state to be heard, they thought it right to go to the proper repository to see whether they could find the will; and there \*they found another will. Now, cer- [\*6]

(a) 4 Sim. 628.

(b) 4 Sim. 76.

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tainly, if that course had been adopted in the year 1833, 1834, or 1835, instead of 1838, it would have saved all the trouble and expense to which the parties have been exposed. Whatever reason there was to examine in January, 1838, the same reason must have existed in 1833, 1834, and 1835; but, knowing of the existence of that will in January, last, if it be material at all, it was undoubtedly the duty of those who had the management of the suit to bring that circumstance to the notice of the court as soon as they discovered the fact: but that is not done; and an application is made to the Master of the Rolls, in the month of June, for liberty, in some way or other, to bring this second will before the court. Now, all that the Master of the Rolls has done is to make the parties applying pay the costs, and leave it entirely open to them to come before him again, either upon an application to amend the information or upon an application to file a supplemental information, upon proper evidence and making a proper case. He has pronounced no judgment against either the one relief or the other. All that the Master of the Rolls has done is to say, "As the matter stands, I cannot make either of the orders that you ask, and, at all events, you must pay the costs; your application is made for the purpose of relieving yourself from a difficulty into which you have got; and whatever excuse there may be for the relators not having discovered this will before, that is no reason why the defendants should be put to unnecessary costs."

Then why do the relators come here? I am perfectly clear that the Master of the Rolls could not make the order desired as the case then stood; and whether the Master of the Rolls may or may not be able to make the [\*7] order, if the parties bring the case before him in a proper shape, is not a matter for my present consideration.

Now then, as to the amendment. The cause being so near the hearing, the relators apply that they may be at liberty to amend their information by introducing this other will, "and otherwise touching the same as counsel may advise;" that is to say, to amend the information in such shape and form as they might please. It is quite consistent with that that they should amend the information by extending it to the other property. It is true that Mr. Cooper says, that that is not their object; although the application to the Master of the Rolls, if granted, would have permitted that to be done.

Now let us see how the orders stand with regard to the amendment. The thirteenth order, as amended, says, "That after an answer has been filed the plaintiff shall be at liberty, before filing a replication, to obtain, upon motion or petition, without notice, one order for leave to amend the bill; but no further leave to amend shall be granted after an answer and before replication, unless the court shall be satisfied by affidavit that the draft of the intended amendments has been settled, approved, and signed by counsel, and that such amendments are not intended to be made for the purpose of delay or vexation, but because the same are considered to be material to the case of the plaintiff: such affidavit to be made by the plaintiff, or one of the

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plaintiffs, where there is more than one, and his, her, or their solicitor, or by such solicitor alone, in case the plaintiff or plaintiffs, from being abroad or otherwise, shall be unable to join therein: but no order to amend shall be made after answer and before replication, either without notice or upon affidavit in manner hereinbefore mentioned, unless such order be obtained within six weeks \*after the answer, if there be only one defendant, or [\*8] after the last of the answers, if there be two or more defendants, is to be deemed sufficient. But this order shall not extend to amendments which are made only for the purpose of rectifying some clerical error." So far does the order guard the defendant against improper amendments in that early stage of the cause. Then the fifteenth of the original orders says, "That after a replication has been filed, the plaintiff shall not be permitted to withdraw it, and to amend the bill, without a special order of the court for that purpose, made upon a motion, of which notice has been given, the court being satisfied by affidavit that the matter of the proposed amendment is material, and could not with reasonable diligence have been introduced into the bill."

Now it cannot be supposed, that in that latter stage of the cause, the court will require less distinct information as to the intended amendments, than is required by the thirteenth amended order in the earlier stage of the cause; and how is the court to be satisfied that the proposed amendment is material, or that it could not with reasonable diligence have been introduced before, and that the court ought to exercise its discretion by permitting the amendment to be made, when the party applying does not tell the court what is the amendment he intends to make; and, even now, there is no reason to suppose, independently of what is stated by counsel at the bar, that the relators do not mean to extend the amendment by praying for relief with regard to this additional property, which is comprised in the second will. It is quite clear, that when a party comes with an application for leave to amend after replication, he must come with as much strictness as is required by the thirteenth order; because he is seeking the extraordinary indulgence of postponing the cause and amending the \*information, by putting in [\*9] issue a new fact, which is stated to be material for the consideration of that which is the subject of the original information in issue between the parties; and praying all this at a stage of the cause in which the parties ought to have been long since prepared to go to the hearing upon the real merits, and to have the judgment of the court upon the case, as it is stated in the pleadings. I do not say that the party may not obtain leave to amend; he may or may not. I abstain from giving any opinion as to the materiality of that second will in the construction of the first. I am told it is not meant to extend the information to the property to which that will relates; and therefore I am not under the necessity of observing at all upon what might be the case if that had been the object; but I am bound to protect a defendant against an amendment which might lead him into new litigation upon

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new property, under the pretence of amending the record. The application, therefore, for leave to amend, as the matter stood before the Master of the Rolls, was one which it is quite clear he could not attend to.

With regard to the supplemental information, it appears to me to be precisely the same. I am anxious to avoid going into any discussion upon those two cases<sup>(a)</sup> that have been cited. Although their circumstances are different, it may not be very easy, perhaps, to see what line his Honor the Vice-Chancellor intended to draw. It is not at all necessary for me to give any opinion as to whether leave was necessary to file a supplemental bill for the purpose merely of putting the new matter in issue; for I am quite clear that, if that is to be done by supplemental bill which might be done by [\*10] amendment, \*the court would require as much strictness as it would require for the purpose of amendment, if leave were required; and if leave is not required for that purpose, of course no order is necessary, and then the application fails on its own grounds, namely, that you are applying for leave to do that which you do not want leave to do; but if you do want leave to do it, (which is the relators' case,) then I say that the objection which applies to the amendment applies to the supplemental bill, that the court has not the security of knowing what is intended to be done, and you are asking for an order which may be wanted for the purpose stated at the bar, but which will enable the parties to file a supplemental bill for any purpose, viz., that purpose which is disclaimed at the bar; for, if the order were made as it was asked at the Rolls, it would enable the party to pray relief as to the additional property which is comprised in the second will.

I have looked at the case only as the Master of the Rolls had it before him, because I am sitting here to decide whether the Master of the Rolls made the proper order, and whether the parties coming here are aggrieved by anything that the Master of the Rolls did. The Master of the Rolls did nothing but make the parties pay the costs, which, under the circumstances, they must have paid, and he refused to make the order desired, as the facts stood before him. He gave them the indulgence of coming again by an amended notice of motion. I do not see what good they got by that indulgence, because they were at liberty without it to make a new motion; but the order was probably so worded for the purpose of avoiding the appearance of having decided anything against them on the right to amend, or the right to file a supplemental information if a proper case were made for the purpose. That the [\*11] Master of the \*Rolls could not, consistently with the practice of the court, either for the purpose of amendment or for the purpose of filing a supplemental information, make such an order as was asked by the notice of motion, appears to me perfectly clear. I see as little reason for the party coming here in this case as in any I ever saw, because the relators were not in the slightest degree prejudiced by what the Master of the Rolls has done; and therefore this application must be refused with costs.[1]

(a) *Colclough v. Evans*, 4 Sim. 76, and *Crompton v. Wombwell*, Ib. 626.

[1] Vide *Phillips v. Goding*, 1 Hare, 40.

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In re Isaac.

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In the Matter of JOHN ISAAC, a Tenant, *pur auter vie*.

1838 ; August 3.

The court has no power to order a remainderman expectant upon the determination of an estate *pur auter vie* to pay to the tenant *pur auter vie* the expenses of producing the *cestui que vie* under the act 6 Ann. c. 18.

A petition which the court has no jurisdiction to entertain may be dismissed with costs. *Semble*.

UPON the motion of Emma Meyrick, who represented herself to be entitled to the immediate reversion of certain hereditaments in the parish of Llangefni, in the county of Anglesey, after the death of Elizabeth Grindley whose death was alleged to be concealed by John Isaac the tenant *pur auter vie*, it was ordered by the Lords Commissioners, on the 23d of November, 1835, that John Isaac should produce the said Elizabeth Grindley, for whose life the estate was held, to George Bradley Roose of Amlwch, gentleman, on the 14th of December, then next, between the hours of ten and twelve in the forenoon, at the church door, at the parish church of Llangefni, according to the statute of 6 Ann. c. 18, intituled an act for the more effectual discovery of the death of persons pretended to be alive, to the prejudice of those who claim estates after their deaths.

This order was not complied with. John Isaac died on the 12th of [\*12] December, 1835, having appointed his wife Alice Isaac his executrix, who proved his will.

On the 2d of August, 1836, the Lord Chancellor made an order upon Alice Isaac, similar to that which had been made upon John Isaac, and by such order Alice Isaac was required to produce Elizabeth Grindley at Llangefni church, on the 15th of September, 1836.

This second order was not complied with ; and on the 11th of November, 1836, it was ordered, upon the petition of Alice Isaac, that the order of the 2d of August, 1836, for the purpose of finding out and procuring Elizabeth Young, formerly Elizabeth Grindley, should be extended to the first day of Hilary term, 1837 ; Alice Isaac undertaking, by her counsel, to deal with the rents and the possession of the property as the court should direct.

The first day of Hilary term, 1837, passed over without the production of the *cestui que vie* ; and, thereupon, Emma Meyrick presented a petition, praying that Alice Isaac might be ordered to deliver up possession of the premises, and might pay to the petitioner the half year's rent which had become due in November, then last ; and that the petitioner's costs of the order of the 11th of November, 1836, and of the present application, taxed as between solicitor and client, might be paid to the petitioner by Alice Isaac.

On the 27th of February, 1837, the last mentioned petition was, upon the application of Alice Isaac, ordered to stand over for a month, upon the terms of the undertaking contained in the order of the 11th of November, 1836, being continued in the meantime : but no order was drawn up.

\*A person stated to be Elizabeth Young, formerly Elizabeth Grind- [\*13] ley, appeared at Llangefni church door on the 27th of March, 1837.

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Emma Meyrick's petition was subsequently ordered, upon the application of Alice Isaac, to be put into the Vice-Chancellor's paper. It accordingly came on to be heard before the Vice-Chancellor, on the 22d of April, 1837, when an affidavit was read, which stated that Elizabeth Young, formerly Elizabeth Grindley, being the person mentioned in the petition, was produced to George Bradley Roose, at the church door of Llangefni, on the 27th of March, then last, between ten and twelve o'clock in the forenoon, on behalf of Alice Isaac. The Vice-Chancellor then made an order, bearing date the same 22d of April, 1837, by which it was ordered that Emma Meyrick's petition should be dismissed, and that she should pay to Alice Isaac her costs of the motion, and the costs of both petitions, and also her (Alice Isaac's) costs, charges, and expenses reasonably and properly incurred by her in finding out and bringing over Elizabeth Young, formerly Elizabeth Grindley, from Ireland to the parish of Llangefni, and in sending her back again to Ireland, such costs, and costs, charges, and expenses to be taxed and settled by the master in rotation.

Emma Meyrick now presented a petition, praying that the Vice-Chancellor's order of the 22d of April, 1837, might be discharged.

Mr. *Wakefield* and Mr. *Girdlestone*, in support of the petition, submitted that the Vice-Chancellor's order ought to be discharged; first, because the act of parliament did not give any power to award costs; and, secondly, because, if the act had given such a power, it ought not, under the circumstances, to have been exercised by making Emma Meyrick pay the costs. They cited *Ex parte Bright in re Clark*; (a) and they further contended that, according to the terms of the act, the *cestui que vie*, being in Ireland, ought not to have been produced in England, at all.

Mr. *Wigram* and Mr. *Richards*, contra, contended that the court has an inherent jurisdiction as to costs in all cases in which it has authority to interfere at all; and that, if the court had not jurisdiction to award costs in such a case as this, the whole profits derived from an estate *pur auter vie* might be exhausted by the tenant *pur auter vie*, in paying the expenses of his compliance with repeated orders for the production of the life.

THE LORD CHANCELLOR :—I think this question of costs is divided into two totally distinct considerations. The first proceeding was clearly within the act. Whether the act be or be not oppressive, as it has been argued that it is, it is certain that it imposes upon the holder of an estate *pur auter vie* the obligation to produce the person for whose life he holds.

In acting under the provisions of this act, I am not sitting in the Court of Chancery at all. I am performing a particular duty imposed upon me by the statute. It constitutes part of the duty of the Judges of the Court of Chancery, to carry into effect these enactments; but it is not the Court of Chancery that carries them into effect. A party has a right, upon an

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an application made under the act, supported by such an \*affidavit as [\*15] the act requires, to impose upon the tenant *pur autre vie* the burden of producing, once in every year, if the applicant think fit, the person by whose life he holds. That is a power which exists only in this act, and is limited by the act. I cannot consider it as sitting in the Court of Chancery. I am administering the duty imposed upon me by this particular act of parliament, and I have no power to go beyond it. The first section of the act is entirely silent as to costs, and there is a reason for that, namely, that if the first section is properly carried into effect, no costs will be incurred, for the respondent is no party to the proceeding which takes place before the judge. The order is served upon the party, and no costs can have been properly incurred by him. There may be expenses, but there can be no costs. I certainly think that, so far as these proceedings have been taken under the authority of the act of parliament, I have no power to make any order as to costs.

The expense of bringing the *cestui que vie* from Ireland appears to me to have nothing to do with the act; and, indeed, the act contains a provision to prevent such a course being adopted.

The other proceedings are open to an entirely different consideration. Mrs. Isaac's application might, undoubtedly, have been dismissed with costs. She had no right to make the application; but not only is her petition not dismissed with costs, but she comes under an undertaking to deal with the rents and profits, and with the possession of the estate as the court should direct. The court had no power to take that undertaking, and she had no power to give it. However, the court did take it, and it necessarily led the other side to take the proceeding which they subsequently did \*take. When I first heard of Mrs. Isaac's undertaking, I thought that [\*16] Mrs. Meyrick's petition should have been (as it was) dismissed with costs; but when I see what the terms of the undertaking were, that objection is removed, and Mrs. Meyrick certainly ought not to be made to pay any of the costs of these two petitions; for the costs of both grew out of Mrs. Isaac's application for indulgence.

The result is, that upon the merits of the proceedings which have been taken, independently of the act, I am clearly of opinion that Mrs. Meyrick ought not to be ordered to pay the costs; and as to those proceedings which were taken under the act, I think it quite clear that I have no jurisdiction as to costs.

Order discharged as to costs.



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[\*17] *\*Between Her Majesty's ATTORNEY GENERAL, at the Relation of the Honorable WILLIAM FRANCIS SPENCER PONSONBY and Others, Rate-Payers in the Borough of Poole, Informant ; and The Mayor, Alderman, and Burgesses of the said Borough of POOLE, and THOMAS ARNOLD and ROBERT HENNING PARR, Defendants.*

1838 ; January 17, 18, 19 ; November 7.

The Court of Chancery has jurisdiction to prevent the town council of a borough from abusing the power given to them by the act 5 & 6 W. 4, c. 76, of awarding compensation for the emoluments of offices ; and no difference in this respect is made by the circumstance that the compensation is about to be raised by means of a rate.

Whether compensation can, under that act, be given for the emoluments of an office which the officer has voluntarily resigned, *quære*.

*Semble*, that in estimating the amount of compensation, the emoluments of offices dependent upon that which gives the right to compensation may be considered.

Where the case against one defendant is so entire as to be incapable of being prosecuted in several suits, but yet another defendant is a necessary party in respect of a portion only of that case, such other defendant cannot object to the suit on the ground of multifariousness.

Whether it is essential to the validity of a demurrer for want of parties, that it should point out who the necessary parties not before the court are, *quære*.

Upon allowing a demurrer for want of parties, leave given to amend by striking out that part of the bill which rendered such parties necessary.

THIS was an appeal from an order of the Master of the Rolls allowing two demurrers ; one put in by the defendants, the corporation of Poole, and the other by the defendant Robert Henning Parr, the late town clerk of the borough.

A statement of the allegations and prayer of the information will be found in the second volume of Mr. Keen's reports ; (a) but the Lord Chancellor's judgment renders it desirable to make a few additions to that statement.

[\*18] *\*The information enumerated the various offices not in the gift of the corporation, which Parr was alleged to have held, one of which was the office of clerk to the magistrates ; and it alleged, that soon after the passing of the municipal reform act, Parr resigned, or expressed his intention to resign, the office of town clerk and clerk of the peace, and to retain the office of clerk to the magistrates, the holding of the last mentioned office and that of clerk of the peace by the same person being prohibited by the said act, Parr being (as he expressed himself before a committee of the House of Commons) confident of being appointed clerk to the new magistrates on their being appointed under the said act, and the last mentioned situation being more appropriate to the appointment which he also held of clerk to the guardians of the poor, and Parr at the same time conceiving that it was equally necessary for him to resign his situation of town clerk.*

After stating Parr's resignation of the office of town clerk and clerk of the peace, the information alleged that, in consequence of such resignation, he was not re-elected to the office of town clerk, and was not appointed clerk of

(a) 2 Keen, 190.

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the peace, but that Thomas Arnold was, on the 1st of January, 1836, chosen and elected such town clerk, and was, on or about the 1st of July, 1836, appointed or confirmed by the council in his office of clerk of the peace, "the said Robert Henning Parr retaining the office of clerk to the magistrates, and the other offices held by him as aforesaid."

The information alleged that Parr, in his statement or claim of compensation, included the profits derived from the offices which it had before enumerated as having been held by him, and as not being in the gift of the corporation; and it stated that the sum of 4500*l.* "was awarded to him [\*19 "as a compensation, nominally for the loss of his aforesaid office of town clerk, but virtually of all the said offices;" and that the sum claimed and the sum awarded was made up and constituted, not only of the profits derived by him from the office of town clerk, but also of the profits derived by him from the office of clerk of the peace, "and the said several other offices so held by him as aforesaid;" and that the compensation was calculated, not alone upon the profits of the office of town clerk, "but also of all the said other offices."

The borough rate of 5000*l.* was stated to have been ordered and determined upon by the mayor, aldermen, and burgesses, acting in concert with Parr, for the purpose of paying and discharging the bond given to him, and the principal money and interest thereby secured.

The demurrer of the corporation assigned, upon the record, the following causes of demurrer, viz., first, want of jurisdiction; secondly, want of equity; thirdly, multifariousness; and, fourthly, that there were not proper parties to the information, and that there was not and were not any person or persons party or parties to the information, who represented or had a common interest with the persons or class of persons whose interests the information affected to protect and for whom relief was thereby prayed.

The demurrer of Mr. Parr, assigned, upon the record, the following causes of demurrer, viz., 1st, want of equity; 2dly, multifariousness; and, 3dly, that it appeared by the information that the corporation had caused to be levied two instalments of a certain rate therein mentioned, and that such instalments had been paid, and that all the persons by whom the same had "been paid were necessary parties to the information, but yet [\*20] such persons had not been made parties to the information.

Sir *W. W. Follett*, Mr. *Wigram*, and Mr. *Lynch*, in support of the appeal.

Sir *C. Wetherell*, Mr. *Knight Bruce*, and Mr. *James Russell*, in support of the demurrer of the Corporation of Poole.

Mr. *Jacob*, and Mr. *Puller*, in support of the demurrer of Mr. *Parr*.

Sir *W. W. Follett*, in reply.

The following authorities were cited upon the argument of the appeal, in addition to those mentioned in the report of the argument at the Rolls, viz. *Marshall v. Pitman*,<sup>(a)</sup> *The Attorney General v. The Corporation of*

(a) 9 Bing. 595.



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*Norwich*, (a) *Vernon v. Vernon*, (b) *Campbell v. Mackay*, (c) *Turner v. Robinson*, (d) *Milward v. Thatcher*, (e) *The Attorney General v. Jackson*, (g) *Lumsden v. Fraser*, (h) *Castle's Case*, (i) *Beckford v. Hood*, (k) *Rex v. Norwich*, (l) *Adair v. The New River Company*, (m) *Cockburn v. Thompson*, (n) Lord Redesdale on Pleading. (o)

[\*21] \*Nov. 7.—THE LORD CHANCELLOR:—In this case, the corporation Poole, and Mr. Parr, the late town clerk, demurred, generally, to the information; and four causes of demurrer were stated and relied upon in argument; want of jurisdiction, want of equity, multifariousness, and want of proper parties. The Master of the Rolls allowed the demurrer for want of equity, expressing no opinion upon the other grounds. From the view I take of the case, it will be my duty to consider them all. If it were necessary to do so, it would, I think, be difficult in this case to draw any distinction between the two first grounds of demurrer, want of jurisdiction, and want of equity. If the information do not state a case for the exercise of the equitable jurisdiction of this court, there necessarily is no jurisdiction; and if such a case be stated, the jurisdiction of this court must exist, unless it be taken away by statute. It will, however, at all events, be convenient to consider these two questions together; and it appears to me to be necessary to consider the latter question first. I proceed, therefore, to inquire whether the information states a case for the interference of a court of equity; and secondly, if it do so, whether the ordinary jurisdiction of this court be or be not taken away. Before I examine the allegations in the information, I will shortly consider the provisions of the stat. 5 & 6 W. 4, c. 76, as they bear upon this question.

That this statute creates a trust, in the corporation, of the borough fund, I have had in other cases to decide, particularly in the case of *The Attorney General v. Aspinall*; (p) and seeing no reason to alter that opinion, I

[\*22] shall, for the present purpose, consider that as a settled point. By sect. 92, the money raised by the rate is directed to be paid over to the account of the borough fund, subject to the provisions before contained; and by the 66th section, the money payable to officers entitled to compensation, is to be paid out of the borough fund; and by sect. 67, the bond directed to be given to secure such compensation, is made a charge upon the same fund: so that the payment which this information seeks to prevent, is a payment out of the borough fund, although created by means of the rate; and if this court has jurisdiction to prevent or correct breaches of trust out of the borough fund generally, it must have equal jurisdiction over that portion of it which may have been raised by a rate; and this is totally beside the

(a) 1 Keen, 700; and 2 Mylne & Craig, 406.

(c) 1 Mylne & Craig, 603.

(g) 11 Ves. 365.

(k) 7 T. R. 620.

(n) 16 Ves. 321.

(d) 1 S. & S. 313.

(h) 1 Mylne & Craig, 589.

(l) 1 B. & Adol. 310.

(o) Page 180, 4th ed.

(b) Ibid. 145.

(e) 2 T. R. 81.

(i) Cro. Jac. 643.

(m) 11 Ves. 429.

(p) 2 Mylne & Craig, 613.

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question whether this court has any control over the rate itself. That question, therefore, it will not, I think, be necessary to consider upon this part of the case; for, assuming, for this purpose, that this court has no jurisdiction to correct or interfere with the rate, that will not support a general demurrer for want of equity or jurisdiction, if there be any parts of the information to which those objections do not apply.

It is, then, clear, upon the principles I have stated, that the fund which this information seeks to protect is a trust fund, and that, as such, this court has its ordinary jurisdiction over it; but then it is said, that the acts constituting the subject matter of the present complaint, cannot be considered as breaches of trust, because they are acts which the corporation is, by the statute, expressly authorized to do, and for correcting any error or fault in the performance of which a special jurisdiction is provided by the statute, namely, the Lords of the Treasury. Now, it must be admitted, that if it were not for those special provisions, (assuming always that the fund is a trust fund,) this court would have "jurisdiction to investigate any [\*23] alleged breach of trust in the trustees of this fund. The inquiry then may be reduced to this, what are the special provisions of the statute as applicable to these acts, and do the allegations in the information state a case within such special provisions? for if they state a case not within those provisions, the argument which is founded upon them cannot apply. The special provisions relied upon are to be found in the fifty-eighth, sixty-fifth, and sixty-sixth sections of the act of parliament. The fifty-eighth section provides for the appointment of officers generally, some of whom are to be annually appointed, and it authorizes the corporation to discontinue such as it shall not appear necessary to re-appoint. The town clerk is not an annual appointment; but this section provides that the town clerk and the treasurer shall not be the same person. The sixty-fifth section gives power to the corporation to remove every ministerial or executive officer, but provides that each shall continue to act till removed, and no longer, unless re-appointed under this act. The sixty-sixth section, which is the most important section, provides compensation, 1st, to every officer whose office shall be abolished; 2dly, to officers removed; 3dly, "*or* who shall not be re-appointed as aforesaid," not "*and* who shall not be re-appointed as aforesaid,"—which might have been supposed to provide against the improbable event of an officer being removed, and afterwards being re-appointed, and which it will be presently seen would have been wholly useless, the compensation being only for offices the officer has ceased to hold;—but *or*; introducing, therefore, a class of officers distinct from those whose offices are abolished, or who shall have been removed. Now the only previous mention of any re-appointment is in the fifty-eighth and sixty-fifth sections. The fifty-eighth seems to allude to officers annually appointed: the sixty-fifth may allude \*to [\*24] officers removed and afterwards re-appointed, and may have been inserted for the purpose of preventing the words "*and no longer*" from

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operating as a bar against a re-appointment ; but that section does not intend to describe any class of persons not described in other parts of the act, for it says “ unless re-appointed under this act ;” but the act provides only for re-appointments to annual offices or a re-appointment after a removal : but sect. 66 cannot refer to such persons, because they, being officers removed, would be entitled to compensation under the second description. It would seem, therefore, that the words “ or who shall not be re-appointed as aforesaid,” must refer to sect. 58, namely, to annual officers not re-appointed ; but, however that may be, the question is, whether any part of the description in the sixty-sixth section can be construed to include an officer who voluntarily resigns his office. It was said that he is an officer not re-appointed ; but the words are “ not re-appointed *as aforesaid* :” the act could not have intended to give compensation to an officer who should capriciously and without reason resign, and thereby refuse to perform the duties of the office ; and if it did, it could not have intended to give to the corporation the power of defeating his claim by a formal re-appointment to an office which he had by his resignation declared his determination not to hold. It was said that the corporation might so alter the nature of the office as to compel the officer to resign. If that case be provided for, it would rather fall under the description of abolishing the office than the words now in question.

Passing from the description of the officers entitled to compensation, for what is the compensation to be given ? This same sixty-sixth section says

“ for the salary, fees, and emoluments of the office which he shall so [25] cease to hold.” Sect. 58 having declared that the same person “shall

not be town clerk and treasurer, another section(a) declares that the same person shall not be clerk of the peace and clerk to the magistrates. It was contended that other offices may be so connected with that of town clerk that a removal from that office would, in effect, be a removal from such others : and that, possibly may be so ; but that cannot be said of offices which the act declares shall not be held together ; and it is quite impossible that the act should have intended to give to a removed town clerk, who had also held the offices of treasurer and clerk of the peace, compensation measured by the value of the two latter offices, particularly if he actually continued to hold them. It cannot be said that the act intended to give compensation for offices so unconnected with the office from which the claimant is removed, as not to be capable of being held together, and least of all for offices which the claimant continues to hold : the terms of sect. 66 being, “ the office which he shall so cease to hold.” If, then, the act does not authorize the corporation to give compensation to an officer who voluntarily resigns his office, and the corporation nevertheless do so ; and if the act does not authorize the corporation to give compensation for any office totally unconnected with that which the officer has ceased to hold, or which he continues to hold, and if the cor-

(a) Sect. 102.

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poration nevertheless do so ; can the special provisions of the act, which have no application to the case in question, protect them against the ordinary jurisdiction of this court ? The sixty-sixth section, indeed, gives to the officer an appeal against the decision of the corporation upon his claim, and also to those who opposed the claim, if one-third protest against it as excessive ; but what is the decision so to be the subject of appeal ? that decision which the council are authorized to make ; namely, compensation \*for [\*26] certain losses in certain descriptions of offices. If the council take upon themselves to make compensation to officers not within that description, or for losses with respect to which no compensation is provided by the act, as the statute contains no special provisions applicable to such a case, there can be nothing in it to take away the ordinary jurisdiction of this court. A similar argument was addressed to me in *The Attorney General v. Aspinall*,<sup>(a)</sup> founded upon the remedy provided by the act in certain cases of improper alienation of corporation property : but I did not find any thing in that provision to deprive this court of its ordinary jurisdiction ; nor do I in this, supposing the information to state such a case as I have supposed.

It remains, therefore, to be seen whether that be so or not ; and first, as to whether, according to the statement in the information, any compensation was due for the loss of the office of town clerk. It states that in 1833, Mr. Parr was appointed town clerk and clerk of the peace ; and that, at the time of passing the act, he held certain other offices not in the appointment of the corporation, and, amongst others, the office of clerk to the magistrates, and that, the offices of clerk of the peace and clerk to the magistrates being by the act incompatible, he declared his intention of resigning the office of town clerk and clerk of the peace, and to retain that of clerk to the magistrates, and that he, on the 1st of June, 1836, being the day directed, for the appointment of town clerk, resigned the offices of town clerk and clerk of the peace ; and that, in consequence of such resignation, he was not re-appointed town clerk, or appointed clerk of the peace. Here, then, is a distinct and positive statement that Mr. Parr, voluntarily, and for a reason assigned, resigned the office of town clerk, in respect of which he \*afterwards [\*27] claimed and received compensation ; and if it be not the true construction of the act, that an officer voluntarily resigning an office, not from any alteration in the office, but for private reasons of his own, is nevertheless to have compensation for the loss of such office out of the borough fund, then, according to this statement, the council, in awarding to Mr. Parr any compensation for the office he so resigned, did an act unauthorized by the statute, and to which the provisions of the statute do not apply ; for such is the statement, whatever the real facts of the case may be.

Suppose, however, that the case stated by the information did, within the provisions of the act, entitle Mr. Parr to some compensation for the loss of the

(a) 2 Mylne & Craig, 613.

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profits of the office of town clerk, which he had ceased to hold, what, according to the statement, is the compensation which the council awarded to him? The claim is stated to have been made in respect of the office of town clerk only; but it is alleged that, in his claim, he included the profits of the other offices he held; and the office of clerk to the magistrates, and many other offices, are enumerated, totally unconnected with the office of town clerk, and not under the patronage of the corporation. The offices for which compensation is authorized by the statute are offices of the borough only; and if Mr. Parr had ceased to hold all those other offices, it would have been impossible to justify an award of compensation for the loss of such offices, from whatever cause he might have ceased to hold them.

But that is far from being the whole of the case stated in the information; for, having before stated that Mr. Parr resigned the offices of town clerk and clerk of the peace in order to retain the office of clerk to the magistrates, it goes on to allege that he did retain that office and the [\*28] other offices held by him as aforesaid, and yet that, in his claim he included the profits of all such offices, and that the sum awarded to him was made up and constituted, not only of the profits derived by him from the office of town clerk, but also of the profits derived by him from the office of clerk of the peace, and the said several other offices so held by him as aforesaid; so that, according to this statement, the office of town clerk being the only one in respect of which any compensation was authorized by the act, and in respect of which alone any was claimed, and the profits of that office constituting but a small part of the whole of the profits derived from the whole of the offices held by him, he has had awarded to him compensation calculated upon the profits of all, although he retains all except that of town clerk and clerk of the peace; receiving, in the shape of compensation, the profits of all, and from the offices themselves the profits of all except of those two. This statement is obviously incredible; but I am not at liberty to permit that consideration to influence my judgment. The future progress of the cause will afford opportunities of visiting upon those who have made these statements the consequences of any false charge which the information may contain. I have not the merits of the case before me, but have only to consider whether the information states a case for the interference of this court, if true.

It was argued, that the information does not impute fraud in the proceedings of the council; but a trustee may be guilty of a breach of trust from error or ignorance of his duty, and, if it were necessary to impute fraud, the term itself need not be used; it is sufficient if the fact stated amount to a case of fraud. As to the allegations respecting the adjournments of the con- [\*29] sideration of Mr. Parr's claim, from October to November, \*after the new election, it is true that this court has nothing to do with any party controversies within the borough; but what is alleged to have taken place is not immaterial in considering the motives of the actors in those proceedings. In October, it is clear that a majority of the council were favorable to



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Mr. Parr's claim, as that majority was strong enough to postpone the consideration of it to a time more favorable to him : the postponement, therefore, was not necessary for the purpose of carrying the compensation ultimately awarded ; but, in October, one-third were opposed to it, and might, therefore, have brought the amount by appeal before the Lords of the Treasury ; but, by the election in November, the dissentients were reduced below one-third, a difference alleged to have been created by the votes of persons whose rates were paid for the purpose of enabling them to vote. From this statement, the fair inference is, that the adjournment was resorted to, not for the purpose of awarding a fair compensation, but of preventing its being questioned by appeal. The Master of the Rolls thought that, according to the statement in the information, Mr. Parr came within the description in the act of an officer not re-appointed.(a) I have before made some observations upon that point ; and as there are other grounds for the judgment I shall pronounce, I do not wish to be understood as expressing any decided opinion upon that point ; because it is, in fact, the principal question in the cause, and of the greatest importance to the party, and is therefore a very proper subject for the most deliberative consideration. The Master of the Rolls then seems to think that the remedy, by appeal to the Treasury, was intended by the act to be exclusive, and suggests the inconvenience which might arise from the jurisdiction being exercised at the same time by this court and by the ['30] Treasury.(b) I have already stated that, in my opinion, the case alleged in the information goes far beyond any contemplated by the act, and for which the remedy by appeal was provided, and to which, therefore, the remedy by appeal does not apply ; and as to the objection founded upon the inconvenience which may arise from the exercise of the double jurisdiction, supposing it to be applicable to this case, it would, if it should prevail, deprive this court of its jurisdiction in every case in which another remedy is given by statute, which appears to me to be contrary to many decisions, and to the principle which was recently recognized and acted upon in *The Attorney General v. Aspinall*.(c)

As to the amount awarded, the Master of the Rolls expresses an opinion that, in estimating the loss to be compensated, the loss of dependent offices, consequent on the loss of the office to which the officer is not re-appointed, might be considered ;(d) and I am ready to assent to the proposition so stated, although much would depend upon the particular circumstances of each case ; but it does appear to me that the case stated in the information is by no means within the case supposed in the proposition, but that it absolutely excludes the supposition upon which it is founded, as it is distinctly alleged

(a) See 2 Keen, 204.

(b) See 2 Keen, 206.

(c) 2 Mylne & Craig, 613. [Vide *Frewin v. Lewis*, post 249. 2 Mylne & Craig, (Am ed.) 629, n. 2, and cases there cited. *Birley v. The Constables, &c. of Chorlton-upon-Medlock*, 3 Beav. 499]

(d) See 2 Keen, 207.

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that the offices, the value of which were included in the calculation of compensation, were not dependent upon that for which compensation could alone be awarded, but were, as indeed from their description they must have been, totally independent of it, and that, in fact, they had not been lost, but that the officer still continued in possession of them.

[\*31] \*It is some consolation to me, in differing from the Master of the Rolls, to find that, in this instance, we differ, not upon any rule or principle of law, but upon the views of the facts stated. I am therefore of opinion that the demurrers cannot be supported upon the two first grounds, namely, want of equity and want of jurisdiction.

The Master of the Rolls has expressed no opinion upon the two last grounds of demurrer, namely, multifariousness, and want of parties. As to the first, it is only open for argument upon Mr. Parr's demurrer, for there is one entire case stated as to the corporation; and all the relief prayed, supposing interfering with the vote was within the province of this court, would be necessary to correct and set right the consequences of the improper act complained of; and if Mr. Parr had nothing to do with some part of the case, he could not, I apprehend, complain. If it were competent for him to do so in such a case, there might, in many instances, be a denial of justice: the case against one defendant might be so entire as to be incapable of being prosecuted in several suits; and yet some other defendant might be a necessary party to some portion only of the case stated. I think, therefore, that in such a case, Sir John Leach very properly held that such other party could not maintain an objection of multifariousness; (a) but if this were otherwise, I very much doubt whether Mr. Parr is not to be considered as connected with the whole of the case stated. All that is stated, and all that is prayed arises from the awarding, securing, and paying the compensation to him;

and there is no part of the relief prayed which, if granted, would not [\*32] affect him. His future payments are to be made out of the \*future instalments of the rate. I am, therefore, of opinion that this ground of demurrer fails also.[1]

As to the parties, it is clear that there is a defect of parties as to so much of the information as prays relief as to the rate, and the refunding of instalments paid; and Mr. Parr's demurrer is free from the objection raised that the proper parties are not suggested. Upon this ground, therefore, Mr. Parr's demurrer must be allowed, but it will be of course to give leave to amend the information.

It remains to be considered whether a similar order ought to be made as

(a) See *Turner v. Robinson*, 1 S. & S. 313.

[1] As to multifariousness, see further, 1 Sim. & Stu. (Am. ed.) 65, n. e. *Dunn v. Dunn*, 2 Sim. 329, 331, and n. 1, (Am. ed.) *ibid.* *The Attorney General v. Cradock*, 3 Myl. & Cr. 85, 97, and n. 1, (Am. ed.) *ibid.* *Manners v. Rowley*, 10 Sim. 470, 471, and n. 1, (Am. ed.) *ibid.* *Gaines v. Chew*, 2 Howard, 619, 642. *Birley v. The Corporation &c. of Charlton-upon-Medlock*, 3 Beav. 499. *Davoue v. Fanning*, 4 Johns. Ch. Rep. 204. *Curtis v. Tyler*, 9 Paige, 434. *Brown v. Douglas*, 11 Sim. 283.

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to the demurrer of the corporation. As the information must be amended upon Mr. Parr's demurrer, this point can only be material with respect to the costs of the demurrer of the corporation. It was contended that the objection, for want of parties, was in the nature of a plea in abatement, and that the party objecting was therefore required to give to the plaintiff the information necessary to enable him to correct the alleged defect; and Lord Redesdale's book<sup>(a)</sup> was quoted in support of this objection. Certainly Lord Redesdale so states the rule, and that passage has been adopted by subsequent writers upon equity pleading; but he does not refer to any authority in support of that *dictum*. It is not necessary to inquire how far that proposition is consistent with the general doctrine upon the subject of demurrers, or with the well established practice of allowing demurrers *ore tenus* for want of parties. There seems, at least, sufficient ground for the doubt suggested by Lord Eldon in *Pyle v. Price*.<sup>(b)</sup> It is not necessary to inquire into this point,[2] because I think the demurrer of the corporation does sufficiently \*point out the parties who the defendants mean to insist ought to be [\*33] parties. Looking at the information and the demurrer together, it is impossible not to see who the persons are whose absence is intended to be relied upon as an objection to the information. I am, therefore, of opinion, that both the demurrers must be allowed for want of parties, but leave must be given to amend.[3]

(a) Page 147, 3d ed. p. 180, 4th ed.

(b) 6 Ves. 781.

[2] In *Dias v. Bouchaud*, 10 Paige, 454, Walworth, Ch. says: "Lord Redesdale, in his valuable treatise upon equity pleading says, a demurrer for want of parties must show who are the proper parties. Not indeed by name, for that might be impossible; but in such manner as to point out to the complainant the objection to his bill, and thus enable him to amend by adding the proper parties. And in this he appears to be sustained by all the standard treatises upon the subject of equity pleading. Lord Cottenham in the recent case of *The Attorney General v. The Corporation of Poole*, expressed a doubt as to the correctness of the rule as laid down by Lord Redesdale. And he refers to what he calls the doubt suggested by Lord Eldon in *Pyle v. Price*. Mr. Daniell has, however, as I think, taken the proper view of what was said by Lord Eldon in the case referred to. He is of opinion that the observation which is reported to have been made by Lord Eldon, in *Pyle v. Price*, does not at all shake the rule which has been laid down, as to the necessity of pointing out who the necessary party is, by the demurrer. He says the remark of his lordship merely referred to an observation made by the counsel for the defendants, that there was no rule requiring the demurrer to state the parties, that is by name, as it might be out of the power of the defendant to do so; and that the observation of Lord Eldon, that perhaps there was not a general rule either way, did not refer to the necessity of calling the complainant's attention to the description or character of the party required, in order to enable him to amend his bill, and without putting him to the expense of bringing his demurrer to argument, for the purpose of ascertaining who [whether] the defendant supposed was the necessary party, (1 Dan. Ch. Pr. 386.) I shall, therefore, adhere to the rule as originally laid down by Lord Redesdale, according to its spirit and intent; and shall hold that, in a demurrer for want of parties, the defendant must point out the necessary parties, either by name, in reference to some statement of their names in the bill, or by their characters, as the heirs, devisees, personal representatives, assignees, creditors, &c. of some of the persons therein named or referred to."

[3] As to giving leave to amend after demurrer allowed, by adding parties, see further *Tyler v. Bell*, 2 Myl. & Cr. 89. S. C. 1 Keen, 826. Generally as to leave to amend after demurrer allowed, see *Wellesley v. Wellesley*, post 558.



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*Nov. 13.*—On a subsequent day, Mr. *Wigram* mentioned to the Lord Chancellor, that the words in the prayer of the bill, which had been the ground of the demurrer for want of parties, had been left in the draft of the bill by mistake, and therefore suggested that that part of his lordship's order upon the demurrer which gave leave to amend should give leave to amend either by adding parties or by striking out that part of the bill which rendered those parties necessary.

THE LORD CHANCELLOR said, that it certainly was his intention that the leave to amend should go to that extent.[4]

In pursuance of this intimation, the minutes of the order, as delivered out by the Registrar, gave leave to amend by adding the parties in question, "or by making such amendments as may show that they are not necessary parties."

The defendants not acquiescing in these terms of the order, the case was put in the paper to be mentioned.

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*Nov. 21.*—Sir *C. Wetherell* and Mr. *James Russell*, for the corporation of Poole, objected to the proposed form of the order, upon the ground that [\*34] it would give the informant \*the power of remodelling the whole scope of the information; and they referred to *Milligan v. Mitchell*.<sup>(a)</sup> They submitted, also, that, as the demurrers were separate and the orders allowing them and the petitions of appeal were also separate, a separate order upon each demurrer ought now to be drawn up.

Mr. *Jacob* and Mr. *Puller* appeared for Mr. *Parr*.

THE LORD CHANCELLOR said, he thought that leave should be given to amend, either by bringing before the court the parties whose absence was complained of, or by leaving out that part of the information which rendered their presence necessary; but that his intention certainly was, that the amendments should be confined to that part of the information which rendered those persons necessary parties. His lordship added, that the Registrar then in court informed him that the usual form of giving leave to amend upon allowing a demurrer for want of parties, was to give leave to amend by adding parties, or otherwise as the plaintiff might be advised; and that if that was the usual form, it would be better that it should be adopted in the present instance.

Mr. *Wigram* suggested that the usual form of the order was not considered to be such as mentioned to his lordship by the Registrar.

THE LORD CHANCELLOR then said, that he should certainly direct such words to be introduced into the order as would give leave to amend, by

<sup>(a)</sup> 1 Mylne & Craig, 433.

[4] In *Vernon v. Vernon*, 2 Myl. & Cr. 172, "the Lord Chancellor said that he had reason to believe, that the allegations upon the ground of which he had been obliged to allow the demurrer, had crept into the bill by accident, and that in such a case, the court was in the habit of giving leave to amend."

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leaving out the words of the information which rendered the absent parties necessary. His lordship also intimated that the two demurrers were separate proceedings, and ought therefore to be kept separate.

\*A separate order was ultimately drawn up upon each petition of [\*35] appeal, giving leave to amend by adding parties, or otherwise as the informant might be advised.

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SHUTTLEWORTH v. GREAVES.

1338; November 8.

The wife of F. Shuttleworth was the only child of a person who was entitled to certain shares in the Nottingham canal, which, upon that person's death, were transferred into the names of "F. Shuttleworth and wife"—the wife having been her father's administratrix. F. S. was ever afterwards, until his death, treated by the canal company as proprietor of the shares, and received the dividends upon them, and was elected to be and acted as a member of a committee which, by the company's act of parliament, was required to consist of proprietors of two or more shares. F. S., by his will, bequeathed what he called "all my shares in the Nottingham canal navigation," and all other his personal estate, to trustees, in trust for his wife for life; and after her death, if he should leave no issue, (which happened,) in trust to pay and apply the same equally between all and every his brothers and sisters, *their respective executors, administrators, and assigns, absolutely and for ever*. The testator had no canal shares at all, unless those so transferred into the names of himself and his wife could be considered his. Two of his brothers and a sister, who were all living when he made his will, died in his lifetime.

Held, first, that the words of the will amounted to a bequest of the particular shares before mentioned, and that the widow was bound to elect.

Held also, that the representatives of the brothers and sister who died in the testator's lifetime were not entitled to any share of his personal estate under his will, but that the whole vested in the brothers and sisters who survived him.

THE facts of this case sufficiently appear in the judgment.

THE LORD CHANCELLOR :—By the decree in this cause, it was referred to the master to inquire whether the testator had, at the date of his will, any and what shares in the Nottingham canal navigation, or any and what other canal shares; and he was to be at liberty to state special circumstances relative thereto. The master, by his report, has stated that the testator had not, at the date of his will, any canal shares, except that certain shares in the Nottingham canal had belonged to the father of his wife, and stood in his name, and that, upon his death, the \*daughter, who was his only [\*36] child, obtained administration of his estate, and that the shares were transferred into and stood in the names of "F Shuttleworth and wife :—" That by the act constituting the company, it is required that each member of the committee should be a proprietor of two or more shares; and that the testator was, in 1821, elected a member of the committee, and that he acted in that character, and voted as a shareholder, and received the dividends upon the shares. Such being the state of this property, the testator, by his will, gave

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and bequeathed all his ready money and securities for money, "and my shares in the Nottingham Canal Navigation, and in all other canals," and all other his personal estate, to trustees upon trust to permit his wife to have the use of certain plate and furniture for her life, and to continue or place out at interest all his said ready money and securities for money, and shares in canals, and to convert into money all other his personal estate, and to invest the proceeds, and pay the income to his wife for her life; and in case he should die without leaving issue, (which happened,) to pay and apply all his said personal estate unto and to the use of, and equally between all and every his brothers and sisters, their respective executors, administrators, and assigns, absolutely and for ever.

On the part of the wife surviving, it was contended that the transfer into the names of the husband and wife of the shares in the Nottingham canal, was not a reduction into possession by the husband, and that she therefore was entitled to them. Upon this point, it is not, I think, necessary to express any opinion, because, if such transfer did amount to a reduction into possession, so as to defeat the title of the wife surviving, a new estate was thereby created, under which she, as survivor of the two, would be entitled.

In neither case had the husband any right to dispose of these shares [\*37] by \*his will, and in either, if he did intend so to dispose of them, the question of election equally arises.[1]

The point for consideration, therefore, is, did the testator, by the words in his will, "my shares in the Nottingham Canal Navigation," refer to and intend to dispose of the shares described in the master's report. This point was very properly put by Mr. Turner, in arguing for the widow, principally upon the question whether the terms used gave a specific legacy or not. To try this, we must suppose the shares to have been his own. Would not the legacy, in that case, have been specific? It is a bequest of "my shares," and in a particular company. It must be either specific, that is of what he had, or, assumed to have at the time, or general, that is, a direction to his representative to purchase or procure what is given; but the direction to sell has been held inconsistent with the latter construction. It was argued that the bequest might be construed to mean such shares as he might have at the time of his death, either by a transfer to himself of the shares in question, or by the purchase of others; but the word "my" being expressive of a present title, excludes this argument; besides which, the testator has used other words to include any canal shares afterwards acquired.[2] I must, therefore, assume, that the words describe some existing shares in the Nottingham Navigation, which takes this case out of the authority of the case of *Dummer v. Pitch-*

(a) 2 Mylne & Keen, 262.

[1] *The Attorney General v. The Earl of Lonsdale*, 1 Sim. 105, 109, n. 1.

[2] Vide *Kampf v. Jones*, 2 Keen, 756; *Davies v. Morgan*, 1 Beav. 405, 410, n. 1; *Miller v. Little*, 2 Beav. 259, 260, n. 1; *Hosking v. Nicholls*, 1 Yo. & Coll. C. C. 478.

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*er.*(a) in which Lord Brougham decided, first, that the gift was not specific ; and, secondly, that it was not a case of election ; and I do not feel called upon to enter into any consideration of the question discussed in that case, how far evidence *dehors* the will is admissible, in explanation of the testator's meaning, for the purpose of raising a case of election ; because, in every specific \*devise or bequest, it is clearly competent and necessary [\*38] to inquire as to the thing specifically devised or bequeathed ; and the word "my" constitutes part of the description.[3] I do not use the facts stated in the master's report as evidence of what the testator thought with respect to his title to this property, but as part of the history and description of the property itself, which it is impossible to exclude. It appears, then, that the shares in the Nottingham Navigation stood in the name of the testator, jointly with the name of his wife ; that, by virtue of these shares, he was elected and acted as a member of the committee of the company, and received the dividends ; and that, having no other shares, he bequeathed "all my shares in the Nottingham Canal Navigation." This appears to me, consistently with all the authorities, to be a bequest of the shares in question, and I consequently think that the widow was bound to elect.

The only other question raised, was whether the personal representatives of certain brothers and sisters(b) of the testator, who were alive at the date of the will, but who died before the testator, are entitled to shares in the residue. It appears that all the brothers and sisters who survived the testator, also survived his wife, so that the only question is as to those who died before the testator. Taking the gift as to a class simply, the individuals constituting the class at the death of the testator, are the persons entitled, according to *Viner v. Francis*,(c) although the terms of the gift create a tenancy in common ; but it was argued that the additional words, "their executors and administrators," show that those who were living at the date of the will, but died before the testator, were entitled to take.[4] It has, \*however, [\*39] been decided, that the mere addition of these words does not prevent the lapse of the legacy, by the death of the legatee in the lifetime of the testator, being considered as only descriptive of the interest bequeathed, and because those who take by representation only, cannot be entitled to anything to which the person they represent never had any title ; *Elliott v. Davenport*,(d) *Corbyn v. French*.(e) It follows, that the four persons found by the report to have been the testator's brothers and sisters who survived him, were the parties entitled.

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April 21.—Mr. Tinney and Mr. Sidebottom, for the brothers and sisters who survived the testator, had cited *Duce v. Denison*,(g) *Doe dem. Oxenden*

(a) 2 Mylne & Keen, 262. (b) Two brothers and a sister. (c) 2 Cox, 190. 2 Bro. C. C. 658.

(d) 1 P. Wms. 83.

(e) 4 Ves. 418.

(g) 6 Ves. 385.

[3] Vide 1 Sim. 334, n. 1 ; 1 Keen, 423, n. 2.

[4] Vide 2 Sim. 7, n. 1 ; *Bain v. Lecher*, 11 Sim. 400 ; *Saunders v. Vautier*, Cr. & Ph. 249.

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v. *Chichester*, (a) *Lady Cavan* v. *Pulteney*, (b) *Earl of Darlington* v. *Pulteney*, (c) *Lewis* v. *Lewellyn*, (d) *Standen* v. *Standen*, (e) *Napier* v. *Napier*, (g) *Read* v. *Crop*, (h) *Powell* on *Devises*, by *Jarmau*, (i) *Viner* v. *Francis*, (k) *Martin* v. *Wilson*, (l) *Doe* v. *Sheffield*, (m) and *Thornhill* v. *Thornhill*, (n)

Mr. *Treslove* and Mr. *Morley*, for the representatives of a brother and sister who died in the testator's lifetime, referred to and commented on *But-*

*ricke* v. *Broadhurst*, (o) *Northey* v. *Strange*, (p) *Wild's Case*, (q) *Cole-*  
 [\*40] *man* v. *\*Seymour*, (r) *Devisme* v. *Mello*, (s) *Viner* v. *Francis*, (t)

*Martin* v. *Wilson*, (u) *Doe* v. *Sheffield*, (v) *Thornhill* v. *Thornhill*, (w) *Bateman* v. *Roach*. (x) They contended that the Lord Chancellor must now decide between the conflicting authorities of *Viner* v. *Francis* and *Martin* v. *Wilson*.

Mr. *Wakefield* and Mr. *Turner*, for the widow's representatives, cited *Dummer* v. *Pitcher*, (y) *Nanney* v. *Martin*, (z) and *Judd* v. *Pratt*; (aa) and they said that *Martin* v. *Wilson* had never been questioned by any judge.

Mr. *Temple*, Mr. *Norton*, and Mr. *Campbell*, for other parties.

Mr. *Tinney*, in reply, mentioned *Clarke* v. *Butler*. (bb)

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### \*WEDDERBURN v. WEDDERBURN.

1837; November 10, 11, 13, 14. 1838; November 9.

By articles of partnership, between three persons, it was stipulated that, in case of the death of any one of them, the partnership should cease on a certain subsequent day, and the property of the partnership be then divided between the surviving partners and the executors of the deceased partner. One partner, by his will, directed all his property to be converted and invested for the benefit of his children, and appointed his co-partners his executors, and died, leaving his children all infants. The two surviving co-partners, having proved the will, had the property of the partnership valued, and then proceeded to continue the business under a new firm, and debited the new firm with the value of the testator's share of the partnership property, but did not otherwise execute the directions either of the articles or of the will: Held, that this transaction must be treated as a nullity, so far as the children's interests were concerned.

The executors of a testator, who were also his surviving partners, and had continued to employ

(a) 4 Dow. 65.

(b) 2 Ves. jun. 544.

(c) 3 Ves. 384.

(d) T. & R. 104.

(e) 2 Ves. jun. 589.

(g) 1 Sim. 28.

(h) 1 Bro. C. C. 492; and 1 Swanst. 402. n.

(i) Vol. i. p. 446; and vol. ii. p. 327.

(k) 2 Bro. C. C. 658; and 2 Cox, 190.

(l) 3 Bro. C. C. 324; and see notes in *Belt's* ed. and in *Eden's* ed.

(m) 13 East, 526.

(n) 4 Madd. 377.

(o) 1 Ves. jun. 171.

(p) 1 P. Wms. 340.

(q) 6 Co. 16. b.

(r) 1 Ves. sen. 209.

(s) 1 Bro. C. C. 537.

(t) 2 Bro. C. C. 658. *Belt's* ed; and 2 Cox, 190.

(u) 3 Bro. C. C. 324.

(v) *Ubi supra*.

(w) *Ubi supra*. This decision was said at the bar to have been made upon the hearing of the cause as a short cause; and see *Smith* v. *Smith*, 8 Sim. 353.

(x) 9 Mod. 104.

(y) 5 Sim. 35; and 2 Mylne & Keen, 262.

(z) 1 Eq. Ca. Ab. 68.

(aa) 13 Ves. 168.

(bb) 1 Mer. 304.

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his share of the partnership capital in trade, held answerable for a proportionate share of the profits of the trade, notwithstanding that the capital of the partnership at the time of the testator's decease consisted only of debts due to the partnership.

Degree of weight to be attached to deeds of release executed by *cestuis que trust* within a few days of their respectively coming of age, when such releases profess to proceed upon the examination of complicated accounts.

The bill stated that an account had been made out, showing that a certain sum was due to the plaintiff, and it alleged that the defendants set up that account and the payment of the balance, as a final settlement. The bill charged the contrary, and that much more was due to the plaintiff, as would appear if certain accounts were rendered. A deed of release had, in fact, been executed by the plaintiff, at the time of the payment of the balance in question; but the bill made no mention of it. As this deed of release acknowledged the receipt of certain sums, it could not be wholly set aside; but the court was of opinion, under the circumstances of the case, that it did not deprive the plaintiff of his right to the accounts which he sought. *Semble*, that the proper form of the decree in such a case is to declare that the plaintiff is entitled to the accounts, notwithstanding the provisions of the deed of release; but a decree which directed the accounts without noticing the deed of release, was not considered to require alteration.

Between *cestui que trust* and trustee, no lapse of time will preclude the account from the commencement of the trust, in a case in which the relation of trustee and *cestui que trust* continues, the transactions between them are not closed, and the delay of the claim is attributable to the trustee not having given to his *cestui que trust* that information to which he was entitled, and accounted with him in such manner as he ought.

Difficulties of enforcing in chancery a *cestui que trust's* right (however clear) to participate in profits of a trade carried on in part with the trust fund.

THE facts of this case, and the terms of the decree made upon the hearing at the Rolls, appear very fully in the second volume of Mr. Keen's Reports; (a) \*and they are also stated by the Lord Chancellor in his [\*42] judgment.

The defendants appealed to the Lord Chancellor against the whole decree, except that part which directed the usual accounts of the personal estate of David Webster; and the appellants further submitted that the decree, so far as related to David Webster's estate, was defective, inasmuch as it did not direct that, if in taking the accounts of that estate, and of the administration of it, the master should find any account settled, he was not to disturb or unravel the same.

Mr. Knight Bruce, Mr. Kindersley, and Mr. Colvile, in support of the appeal.

The Solicitor General, Mr Jacob, and Mr. Koe, in support of the decree. Mr. Knight Bruce, in reply.

The following cases, in addition to those mentioned in the report of the hearing at the Rolls, were referred to upon the question of the length of time which had elapsed; viz. *Smith v. Clay*, (b) *Townsend v. Townsend*, (c) *Bonney v. Ridgard*, (d) *Beckford v. Wade*, (e) *Hickes v. Cooke*. (g)

Nov. 9.—THE LORD CHANCELLOR:—Although the papers in this case

(a) Page 722, et seq.

(b) 3 Bro. C. C. 639, n.

(c) 1 Cox, 28.

(d) 1 Cox. 145.

(e) 17 Ves. 87: see p. 97.

(g) 4 Dow, 16.



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are voluminous, and the questions of great importance, the facts, so far  
 [\*43] as they appear to me necessary to be considered, lie in a narrow compass; and the points to be decided are,

1. What was the effect of the arrangement of 1801?
2. What were the rights of the plaintiffs independently of that arrangement?
3. What was the effect of the several deeds executed by the plaintiffs?
4. What ought to be the effect of the time that has elapsed?
5. If the plaintiffs are entitled to what they ask, what ought to be the form of the decree?

1. As to the arrangement of 1801, the facts are simply these. The testator, David Webster, had been engaged in partnership with John Wedderburn and David Wedderburn, under a deed of 1796, for seven years from the 1st of May, 1796, if the three should so long live, in which deed very special provision is made for settling the account with the estate of any one of the partners who might die during the continuance of the partnership. It is thereby provided, that the partnership shall be considered as continuing up to the 1st of May, after the death of any partner; but that, after such death, nothing shall be done by the survivors to prejudice or affect the estate of the deceased or his interest in the joint stock; that within three months from the 1st of May, after the death, the account between the survivors and the estate of the deceased partner shall be made out, so as to show the share and interest of the deceased, and shall be signed by his executors and the surviving partners; that as soon as conveniently may be after such settlement,  
 [\*44] \*all the debts due by the firm shall be paid, and that thereupon a partition and delivery shall be made of all residue of the joint property, including a partition of all debts due to the firm; and the representatives of the deceased partner are to have the right to use the names of the survivors to compel payment of the debts assigned to them.

It appears that John Wedderburn and David Webster, who had carried on the business before David Wedderburn was admitted into partnership with them, were possessed of certain shares in ships, and it has been assumed that such shares constituted part of the joint stock and partnership property; but I do not find that to have been the case, and, on the contrary, I think it appears that these shares were the separate property of each partner, although, no doubt, the possession of such shares was considered as beneficial to the joint trade; and the deed therefore provided that David Wedderburn should purchase one sixth share in the ships from John Wedderburn and David Webster, and that, in the event of the death of either of them during the co-partnership, he should purchase from the representatives of the deceased such further shares in the ships and other property, as should be equal to his then share in the continuing business; but those shares were, as I collect, registered in the names of the individual partners, and therefore could not, accor-

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ding to the case of *Ex parte Yallop*,<sup>(a)</sup> be considered as part of the partnership estate, and I do not find that there was any intention that they should be so considered.

David Webster died in March, 1801, and appointed his wife and his two partners, John Wedderburn and \*David Wedderburn, ex- [\*45] ecutors of his will; but the two latter alone proved. By this will, the children of David Webster were entitled to certain interests in his property; but I do not find that it contained any directions as to the mode of settling the account with the surviving partners. It however directed his executors to convert his *shares* of ships and other property into money as soon as might be after his decease, and to invest the proceeds for the benefit of his family. Some stress was laid, in argument, upon the fact of the testator having appointed his partners his executors; and no doubt that appointment proves the testator's confidence in them, and in the prosperity of the business in which he had been engaged; but that the testator should have been desirous of conferring upon them that office, is much less matter of surprise than that they should have accepted it, assuming, what I see no reason to doubt, that they intended to act with the most perfect honor and integrity towards the family of their deceased partner. Had the representatives of the testator not been his surviving partners, their duty would have been to have followed, as closely as possible, the provisions of the deed and the directions of the will; and any settlement they might have come to with the surviving partners would have been binding; but the union of the two characters in the same person rendered any binding settlement extremely difficult. A strict adherence to the provisions of the deed could hardly have been so conducted as to have excluded future investigation and inquiry; but they did not attempt to observe those provisions, or to follow the directions of the will, but assumed to themselves the power and right of selling as executors, and purchasing as partners, the testator's shares in the ships, and in such of the debts and other property belonging to the firm as they were desirous of becoming possessed of. But that was not all; for, instead \*of setting apart and in- [\*46] vesting the sum assumed as the purchase money, as directed by the will, they kept it as a debt due from the new firm, exposing the property of the infants to all the risks of trade. I am clearly of opinion that these transactions of 1801 had no effect whatever in altering the position of the testator's property and interest, and that the rights of his children are to be considered precisely as they would have been if no such transaction had taken place. If any authority were required for this purpose, the language of Lord Eldon, in *Cook v. Collingridge*,<sup>(b)</sup> as quoted by the Master of the Rolls,<sup>(c)</sup> would be amply sufficient. Upon the first point, therefore, I entirely concur with the judgment of the Master of the Rolls.

2. How then does this part of the case stand, treating this attempted settle-

(a) 15 Ves. 60.

(b) Jacob, 607; see p. 621.

(c) See 2 Keen, 731.



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ment as of no effect? John Wedderburn and David Wedderburn, as surviving partners, instead of separating the property of their deceased partner from the property employed in carrying on the business, continue to employ it in their own business. This according to *Brown v. De Tastet*,<sup>(a)</sup> *Crawshay v. Collins*,<sup>(b)</sup> *Featherstonhaugh v. Fenwick*,<sup>(c)</sup> *Cooke v. Collingridge*,<sup>(d)</sup> and other cases, would have subjected them to an account for the profits made thereby; but, as personal representatives, they, instead of realizing their testator's property, and investing it according to the directions of the will, employ it in their trade and business. This subjects them, as executors, to ac-

count for the profits thereby made; as in *Docker v. Somes*.<sup>(e)</sup> In each [\*47] of the two characters they held, they are \*subject to the account decreed against them. Upon this second point, therefore, there is not I think, any doubt of the propriety of the Master of the Rolls' decree. It was, indeed, contended that there was no employment of the testator's capital, the capital of the trade consisting only of debts due; but why were they not called in, but for the interest of the survivors, and what enabled them to give the credit but the capital of the testator?

3. The effect of the deeds executed by the children is next to be considered, and first in date that executed in 1809, by the plaintiff Sir James Webster Wedderburn. It is, in the first place, to be observed that the appeal is against so much of the decree only as directs accounts to be taken of the transactions of the several partnerships, except that it complains that the decree does not direct that if, in taking the accounts of and relating to the personal estate of the testator and the administration thereof, the master should find any account stated, he was not to disturb or unravel the same. The direction thus suggested is not, as I conceive, adapted to the facts of this case, in which an account alleged to be a settled account, that is, the account endorsed upon the deed, is put in issue and proved in the cause. It is in such cases for the court to direct what shall be the effect of such an account, and not to leave that question to the Master. Except as to this point the appeal would appear to be the appeal of the partners in the successive firms, and to complain only of the decree so far as it directed an account of the profits; but the deed of 1809 is not between Sir James Wedderburn and any other as partner in the business, but between him and the late John Wedderburn, as executor of James Webster, whose estate is not in question upon this appeal, and as one of the

executors of David Webster, the testator; and that deed takes no notice [\*48] of any claim the plaintiff \*might have against the continuing or succeeding partners in the business, but deals only with the liability of John Wedderburn as personal representative; nor does it profess to state or settle any account of the personal estate of David Webster, but reciting that the residue of such personal estate, after payment of debts, was considered or

(a) Jac. 284.

(b) 15 Ves. 218; 1 J. &amp; W. 267; 2 Russ. 325.

(c) 17 Ves. 298.

(d) Jac. 607.

(e) 2 Mylne &amp; Keen, 655.

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supposed to amount to 75,068*l.*, upon the account made up and endorsed on the 31st of May, 1809; and that deducting what had been advanced to Sir James Wedderburn, the balance apparently due to him from the estate of the testator was 11,399*l.*, and reciting that a considerable part of the estate of the testator consisted of his share of a debt due from the estate of James Webster of which John Wedderburn was executor and beneficial owner—John Wedderburn undertakes to pay this apparent balance by instalments, in consideration of which the plaintiff, Sir James Wedderburn, declares himself satisfied with the disclosure thus far made, and accounts thus far given, of the personal estate of David Webster, and of the said principal sum or balance of 11,399*l.* being justly due to him from the same estate under the will of David Webster; and that he, John Wedderburn, making the payments as agreed, he, the plaintiff, would not require payment from him or from the other executor of David Webster of the sums so agreed to be paid to him; but it is expressly provided that the deed and the agreement therein contained shall be understood as applying only to the account and state of things on the 1st of May, 1809, as then accounted for, and as not precluding him from claiming any further part, share, or personal estate, or sum of money, under the will of David Webster, not as yet received, fallen in or accounted for.

'The accounts scheduled are of debts due to and from the firm of Webster, Wedderburn & Co. on the 1st of \*May, 1801, and specu- [\*49] lative calculations as to the amount of Sir James Wedderburn's share in his father's property upon various suppositions. So far as this deed is relied upon as excluding an account of the profits of the trade, or which have arisen from the use of the testator's estate, it would be a sufficient answer that the profits so claimed consist of sums of money not accounted for in the account scheduled to that deed. But in fact that deed is not any settlement of any account, but only provides the means of paying an estimated and speculative balance in a manner most advantageous to the accounting party. That deed therefore cannot, I think, operate as any bar to the account decreed.

The next deed is of the 29th of August, 1812, executed by one of the daughters, Miss Anne Webster. It is in most respects the same as the other; but it contains additional proof that there was no intention of settling any general account of the personal estate, and certainly not of the profits of the trade, because it does contain a release as to a certain sum invested and as to sums extended for the benefit of Miss Anne Webster; but the release is expressly confined to those two objects. There is also endorsed upon this deed an account of receipts and payments on account of the personal estate from 1809 to 1812; and that account may be *prima facie* evidence of the items it contained: but it cannot be treated as a binding account, the deed itself providing that it should not preclude any claim in respect of moneys or personal estate not accounted for.

The next deed is of the year 1813, and executed by the daughter Mary,

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afterwards Mrs. Hawkins: it is in all respects similar to the last, and subject therefore, to the same observations.

[\*50] \*The last, and, in point of form, the most important of these deeds, is that executed by the plaintiff Charles Wedderburn Webster, dated the 13th of September, 1820. It purports to release John Wedderburn and Sir David Wedderburn from all demands on account of the personal estate of the testator David Webster, in the most general terms; and it recites that there had been submitted to him (Charles W. Webster) accounts of the said personal estate, and of all the receipts and payments respecting his expectant share thereof, all which he had examined and approved, and found, upon such examination, that his share of the testator's estate consisted of 29,160*l.* 3 per cents., and certain other sums of money specified; and it recites that he (Charles W. Webster) had attained twenty-one on the 10th of that month; and that this investigation of the accounts had taken place since. No accounts are attached to the deed, or proved in the cause, as being the accounts referred to. The Master of the Rolls refers to an account marked No. 11, D, which he supposes to have been the account referred to; but I do not find any evidence of that fact. In the absence of all proof to the contrary, I must assume that the mode adopted upon all the former occasions of stating the account was followed upon this; and that the calculation proceeded upon the statement made in 1809; and if so, it is impossible that such a statement could bind the infant. If there had been any such investigation of the accounts as could have made the release binding, the defendants might have proved it. But though the transaction is impeached, they do nothing but produce the instrument itself; which, upon the face of it, purports to be a release, on the third day after the infant attained twenty-one, of the result of an account extremely complicated in its nature, and of the transactions of very many years, as it must have included the unsettled partnership

[\*51] accounts before the death of the \*testator in 1801, upon the alleged investigation by the infant within two days, and of which account no evidence is given. It cannot be seriously questioned whether the infant can be bound by such an instrument under such evidence.[1] It is, indeed, in-

[1] "I take it to be settled, that where a release is obtained upon a ward's freshly arriving of age, the whole burthen is cast upon the guardian of proving every thing essential to make the release a valid discharge; and nothing is more essential than a full, entire and minute account. The doctrine of a court of equity upon this subject, is an instance of the wise flexibility of its rules, for the preservation of rights. In a court of law, the moment of emancipation from legal privilege, is the moment of absolute power, and of unlimited capacity. This court extends its watchfulness further, and requires that a discharge to the guardian shall not be precipitated; that ample time shall be allowed for consultation and inquiry; that there shall be a full exhibition of the estate, and of its administration; and it requires that a guardian who settles his account in secret, shall be prepared to prove, that he has fully complied with those requisitions, unless he can shelter himself under a positive ratification—a deliberate, intelligent, voluntary acquiescence; or such a flow of time, as will induce the court to refuse its interposition." *Hoffman, Ass't V. C. Fish v. Miller*, 1 Hoff. Ch. Rep. 270. Whether it be the case of a ward, as between him and his guardian, or

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consistent with the whole of the case now made by the defendants that any such account should have been rendered as could alone make any settlement binding; the defendants having always disputed the right of the plaintiffs to any investigation of the subsequent transactions of the trade.

It was then argued that this release by Charles Wedderburn Webster, however liable to be impeached, is binding till set aside, and that the bill does not pray any such relief. If this objection should prevail, it would affect the share of Charles only; and if the court had found itself compelled to yield to the objection, it would not have permitted the real justice of the case to be defeated, but would have enabled Charles Wedderburn Webster to renew his demand in another shape: but although there is some difficulty as to the form in which the case has been brought forward, I do not think that the objection ought to prevail against even the claim of Charles. The bill takes no notice of the deed; but it states that an account was made out of Charles' share, showing that 13,085*l.* was the sum due to him, and charges that much more was due; and it then states that the defendants set up the settlement of the account and payment of the balance upon Charles' attaining twenty one, and charges the contrary, and that he and the other children are entitled to other large sums, as would appear if accounts were rendered of the profits. The defendants, by their answer state the deed, but dispute the claim to an account of the profits to which the deed does not profess to relate. I am of opinion that, under these circumstances, the deed \*and the settle- [\*52] ment which it is alleged to include being in issue, and the latter impeached, it was competent for the court to decree the relief it found the plaintiff to be entitled to, being of opinion that the title to such relief was not precluded by that deed. The decree might, in terms, have decreed the account, notwithstanding the provisions of that deed; and this would perhaps have been the most correct form, because the deed could not have been wholly set aside without injustice to the defendants, as it will still be evidence against Charles Wedderburn Webster of the payments therein acknowledged to have been received, though treated as ineffectual for the purpose of precluding the account; and, looking at the pleadings and the decree together, I think that this is, in effect, the result, and that no alteration in the decree upon that point is necessary. I therefore agree with the Master of the Rolls upon this point also.

4. If, then, the plaintiffs were originally entitled to the account prayed, and if they had not in fact released such title, are they precluded from asserting it by the time that has elapsed?

The case is one of trust. No presumption of payment or satisfaction or waiver can arise, because the title is in dispute at this moment; and the facts upon which the plaintiff's title depends were not made known to them; and

any other person who has just attained years of maturity, and those who have had the management of his estate, as trustees, or however otherwise, *mutato nomine*, the principle is still the same.

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although the commencement of the transaction is of an early date, and one of the plaintiffs attained twenty-one in 1809, and the youngest in 1820, yet the transactions have never terminated or the accounts been finally closed. This appears from all the accounts rendered, all proceeding upon calculations of uncertain dependencies. No case has, under such circumstances, considered time as precluding the account from the commencement, namely [\*53] where the situation of trustee and *cestui que trust* has continued—the transactions between them not closed, and the delay of the claim attributable to the trustee not having given that information to his *cestui que trust* to which he was entitled, and accounted with him in such manner as the court is of opinion he ought to have done. This is not the case of an attempt to raise a constructive trust upon transactions closed many years before, but of a direct trust, of which the transactions are not closed.

In *Beaumont v. Boulbee*(a) an account was directed in 1800, which would commence in 1760. In *Townsend v. Townsend*,(b) in *Beckford v. Wade*,(c) and *Gregory v. Gregory*,(d) this distinction is taken; and in *Chalmer v. Bradley*,(e) Sir Thomas Plumer not only recognized it, but, forty-five years after the testator's death, directed inquiries, with the view, if they should prove favorable to the claim of the *cestui que trust*, to afford him some relief. In this case the same necessity for previous inquiry does not exist.[2]

5. The form of the decree only remains to be considered, and upon this point I have felt some difficulty, arising, principally from the impression I have that the testator's shares in the ships must be considered as part of his private property, and not as part of the joint partnership stock, and the doubt therefore, whether any direction in the decree would meet this part of the case. The Master of the Rolls seems to have thought that the purchase of these shares by the executors was not effectually impeached by the bill; and certainly if it shall appear to be for the interest of the plaintiffs to take [\*54] the amount of the valuation of those shares instead of the shares themselves, the defendants, the executors cannot decline so to account; but I do not think that the present is the stage of the cause in which that is to be determined; and I think that the decree, as it stands, will produce all such information as may be necessary to dispose of this question upon further directions; for it directs the master to take the usual accounts of the personal estate, and he is to be at liberty to state any circumstances specially as he may think fit. The report, therefore, will no doubt bring forward all the necessary information; and as the plaintiffs have not complained of the decree, there might be some difficulty in altering this part of it.

As to the parts of the decree which are subject of the appeal, I think that

(a) 5 Ves. 485.

(b) 1 Cox, 28; see p. 34.

(c) 17 Ves. 87; see p. 97.

(d) Sir G. Coop. 201.

(e) 1 Jac. &amp; W. 51; see pp. 67 and 69.

[2] Vide *Attorney General v. Smithies*, 1 Keen, 308, and n. 1, *ibid.* 2 Keen, 749, n. 1, and *Portlock v. Gardner*, 1 Haro, 594, there cited. *Fish v. Miller*, 1 Hoff. Ch. Rep. 286, 287. Rev. Stat. of N. Y. (2d. ed.) vol. 2, p. 229, § 52.



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they are well calculated to do justice between the parties. The account of partnership transactions up to May, 1801, is quite of course, supposing no settlement of that account to be binding upon the plaintiffs; and as the whole case proceeds upon the assumption that the subsequent trade was carried on in part with the testator's capital, which gives to the plaintiffs a right to participate in the profits of it, if it shall appear to be their interest to claim it, the inquiry directed as to the profits made is, I think, a necessary preliminary to any decree, adjudicating in what manner and to what extent the participation of the plaintiffs in such profits ought to be provided for; and the amount of capital employed in such trade is a necessary part of such inquiry. I consider all these directions and inquiries as preliminary steps only to the final adjudication upon the rights of the parties; and I think that the plaintiffs have made out their title to such inquiries.

"I have had many occasions to consider, and have frequently ex- [\*55] pressed my sense of the difficulties which the court has to encounter in administering equity according to its acknowledged principles in cases of this description.(a) So many decisions have established the right of parties to participate in the profits of trade carried on under circumstances similar to the present, that no question can be raised as to the duty of the court in decreeing such relief when a proper case arises for it; but it is obvious that very great difficulties exist in enforcing this right. Great expense, great delay, and great hardship upon the defendants frequently attend the prosecution of decrees for this purpose, and the apparent benefit decreed to the plaintiff is frequently much diminished, if not lost, in the attempt to enforce it. For these reasons it appears to me that these are cases in which, above all others, it is for the interest of all parties to settle the matters in contest between them by private arrangement and compromise; and I earnestly recommend to the parties to take this into their serious consideration. I have no doubt but that a settlement might be effected which would secure to the plaintiffs more than they can possibly obtain from the most successful prosecution of the decree, and which would, at the same time, protect the defendants against much of the expense, inconvenience, and hardship to which they must be exposed if it be adversely prosecuted. This, however, is entirely for their private consideration; my duty is only to dispose of the matters litigated upon this appeal, which, for the reasons I have before given, I now do by dismissing the appeal with costs.[1]

(a) See *Crosley v. The Derby Gas Light Company*, 3 Mylne & Craig, 428.

[1] As to the subsequent disposition of the above case, see 2 Beav. 208. As to the subject of taking an account in cases of this description, see *Willett v. Blanford*, 1 Hare, 253, important extracts from which will be found 2 Keen, 752, n. 1. The last line of the first paragraph of the Editor's note, *ibid.* is deformed by a misprint, which, it is hoped, will not embarrass the attentive reader.

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 1837.—*Sanderson v. Bayley*.
 

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[\*56] \**Between JACKSON SANDERSON, ROBERT BOCOCK, and ANN, his Wife, Plaintiffs, and WILLIAM BAYLEY and JOHN WATSON, Defendants.*

1837; November 28. 1838; November 12.

A bequest to the testator's "first cousins or cousins german," does not include the descendants of first cousins.

THE will of John Carter, the testator in this cause, contained a clause in the following words, viz.: "And as to the ultimate residue or surplus of the money to arise and be produced from my real and personal estate, hereinbefore directed to be sold and converted into money, I declare and direct that the same shall be in trust for Jackson Sanderson, of Brompton, in the parish of Northallerton, in the county of York, inn-keeper, and all my first cousins or cousins german, who shall be living at the time of my decease, in equal shares, their respective executors, administrators, and assigns."

The plaintiff, Ann Bocock, was the daughter of an uncle of the testator, and the defendant, John Watson, was the grandson of the same uncle; and the bill alleged that there were upwards of forty other persons who stood in one or other of those degrees of relationship to the testator. The only question in the cause was the construction to be put upon the words "my first cousins or cousins german."

By the decree made by the Vice-Chancellor upon the hearing of the cause, on the 20th of December, 1836, his Honor declared that the first cousins in the first degree of the testator, living at his death, and the descendants [\*57] of all first cousins in the first degree of the \*testator, such descendants being living at the death of the testator, were entitled under the words "all my first cousins or cousins german," contained in the testator's will; and he referred it to the master to ascertain who were such first cousins and descendants of first cousins.

From this decree the plaintiffs now appealed.

Mr. *Wigram*, Mr. *Bichner*, and Mr. *Amphlett*, in support of the appeal, contended that no descendants of first cousins could be admitted to share.

Mr. *Treslove* and Mr. *Loftus Wigram*, *contra*, for John Watson.

Mr. *Duckworth* for the defendant Bayley, the executor and trustee of the will.

Mr. *Wigram* in reply.

The following authorities were referred to; Lord Coke's Genealogical Table, (a) *Mayott v. Mayott*, (b) *Earl of Orford v. Churchill*, (c) *Shelly v. Bryer*, (d) *Silcox v. Bell*, (e) *Roper on Legacies*, (g) *Johnson's Dict. Tit. "German," Ainsworth's Dict. Tit. "Patrueles."*

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1838; November 12:—THE LORD CHANCELLOR:—The question upon this

(a) Co. Lit. 18. b.

(b) 2 Bro. C. C. 125.

(c) 3 V. & B. 59.

(d) Jacob, 207.

(e) 1 S. & S. 301.

(g) Vol. 1, pp. 128, 129, 3d ed.

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1838.—Sanderson v. Bayley.

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appeal is the class of persons designated by the testator by the description of "all my \*first cousins or cousins german, who shall be living at [\*58] the time of my decease." The plaintiff is the child of an uncle, and so, beyond all question, a first cousin or cousin german. The defendant, John Watson, is the grandson of an uncle, and so, what is commonly called, a first cousin once removed. It is said that there are no second cousins ; but whether there are any or not, it is quite clear that no person so related to the testator could claim under the designation in this case.

The Vice-Chancellor, by his decree of the 20th of December, 1836, has declared that the first cousins, in the first degree, of the testator, living at his death, and the descendants of all first cousins, in the first degree, of the testator, such descendants being living at the death of the testator, were entitled under the words of the will.

The first thing that occurs is, what may be the effect of this construction in the different possible cases of the family which the decree directs should be inquired into. 1. There may be one first cousin without children, and another with fifty descendants ; all, under the decree, will take equally, so that fifty-one fifty-second parts will go to one family, and one fifty-second to the other. 2. Again, second cousins are clearly excluded ; but a second cousin is in the sixth degree, whereas a descendant of a first cousin may very well be in the ninth or tenth degree ; and yet the latter would take to the exclusion of the former. 3. So the son of a great uncle would be excluded, though in the fifth degree ; but the great grandson, or other descendant of an uncle, would be included, though in the sixth or more remote degree. These are consequences not likely to have been intended by the testator, particularly as the expressions used clearly designate some one class and description of \*propinquity, whereas descendants of first cousins may [\*59] be very remote in point of blood.

There is nothing in the will from which it can be collected that the testator understood and intended to use the expression "first cousins or cousins german," in any other than their ordinary sense. The case, therefore, must be decided upon, first, what is the natural and correct meaning of the words used ; and secondly, upon authority, if any can be found, to assist in the construction.

It is clear that the testator intended to use the two expressions, "first cousins or cousins german," in the same sense ; the one as explanatory of the other. What then is the meaning of a first cousin ? Obviously, the relation first in degree to whom that appellation is given ; that is, the child of an uncle or aunt ; and to no other does the appellation belong ; for though the child of such first cousin is called a first cousin once removed, it is not known by the appellation of first cousin ; and, in fact, it is a cousin in the second degree, though not called a second cousin, as being the second class of persons to whom the appellation of cousin is given. The testator has given his property to his first cousins, and if first cousins and first cousins once, twice, or in



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other further degrees removed, are known by different appellations, how can the latter take under the appellation of first cousins?

If this meaning of the term "first cousin" were doubtful, the doubt would, I think, be removed by the additional term "cousin german." I have looked into several dictionaries, and I find that in them all the two terms are treated as synonymous, and in some both are explained as meaning children of a brother or sister; thus in Chambers' edition of Johnson, it is said, [\*60] "The \*children of brothers and sisters are called cousins german, the only sense in which the word is now used." So in Boniface's French Dictionary, I find, "First cousin—cousin german—children of brothers and sisters." So in Ainsworth, under "*Patrueles*"—"a cousin german by the father's side, a father's brother's son;" "*Frater Patrueles*, the father's brother's son or cousin german."

If such be the universally received meaning of both expressions, what ground can there be for construing them to include others almost indefinitely remote, because, for want of a better description, the term "first" is adopted with an addition, the effect of the whole being, that the parties must be descended from a first cousin, though themselves removed by perhaps many degrees.

It is, however, to be inquired, whether there are any decisions which govern or ought to guide the judgment of the court in this case. There is not any case directly in point, but there are whole classes of cases which appear to me to afford a principle which ought to regulate the present. Unless the testator has shown an intention to the contrary, the term "children" does not include grandchildren; *Radcliffe v. Buckley*.(a) The term grandchildren does not include great grandchildren; *Earl of Orford v. Churchill*;(b) and the term nephews and nieces does not include great nephews and great nieces; *Shelley v. Bryer*.(c) Why then should first cousins once or many degrees removed, be included in the terms "first cousins or cousins german?"

A great nephew is a nephew once removed. The last case of *Shelley* [\*61] *v. Bryer*, carried the doctrine much further "than is necessary to exclude all except those who are strictly first cousins, as there was evidence upon the will of the testator's understanding of the term used. The testator had directed that his property should be divided between his nephews and nieces who might be living at his sister's death; and, by a codicil, he gave "to his infant niece, Harriet Shelley, 500*l.* over and above her share in the body of the will treated of more at large." Harriet Shelley was his great niece, and there was no niece. It was held that the residue was divisible amongst the nephews, and that Harriet Shelley took no part of it, nor any of the other great nephews or great nieces; Sir Thomas Plumer saying, that

(a) 10 Ves. 195.

(b) 3 V. & B. 59

(c) Jac. 207. [See further as to the construction of the terms "children," and "grandchildren." *Mowatt v. Carow*, 7 Paige, 339. *Cutter v. Doughty*, 23 Wend. 520, et seq. *Hone v. Van Schaick*, 3 Edw. Ch. Rep. 474.]

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where there are or may be, at the time of the distribution, persons answering the description, the court is not at liberty to include any not within the term, and that it would be impossible to include Harriet Shelley, and exclude the other great nephews and great nieces. It is true that there are cases in which cousins once or oftner removed have been held to take, though not specifically named. *Mayott v. Mayott*,<sup>(a)</sup> *Silcox v. Bell*,<sup>(b)</sup> and *Charge v. Goodyer*,<sup>(c)</sup> are instances. All these cases proceed upon the same principle, but which appears to me to be wholly inapplicable to the present. In all those cases the gift was to all the testator's first and second cousins, and in all, first cousins once removed were held to be entitled ;<sup>(d)</sup> but not because they were first cousins, but because they were within the degree of second cousins ; and so entirely was that the reason, that in the first, Lord Kenyon said, the intention was to give to relations not more remote than second cousins ;<sup>(e)</sup> and in the two \*last of those cases, first cousins twice re- [\*62] moved were included, Sir John Leach declaring, in the last case, that all persons of the degree of second cousins were included. He would, therefore, have excluded first cousins three times removed, whereas if the parties had been included as first cousins, all, however removed, must have been included, as they necessarily are in the Vice-Chancellor's decree in this case, for all are first cousins in the sense put upon that term by the decree.

These decisions, therefore, not only do not prove that the term "first cousins" can be extended to include first cousins once removed, but the principle upon which they are founded assumes that that cannot be done. That principle, indeed, applied to the present case, would prove that if the descendants of first cousins were included, third cousins must be included also, inasmuch as second and third cousins may well be within that degree of relationship in which the descendants of first cousins may possibly be found : but this would be absurd.

I am, for these reasons, of opinion that the decree of the Vice-Chancellor must be varied, according to the opinion I have expressed, which may be effected by omitting the words, "and the descendants of all first cousins in the first degree of the said testator, such descendants being living at the death of the testator," and in a further part omitting the words "and descendants of first cousins."

The bill may, I presume, be dismissed as against the defendant John Watson ; but I think it reasonable that he should have his costs, to be paid by the plaintiff in the first instance, but without prejudice to any question as to the manner in which they may ultimately be borne.[1]

(a) Bro. C. C. 125.

(b) 1 Sim. & S. 301.

(c) 3 Russ. 140.

(d) In *Silcox v. Bell* and *Charge v. Goodyer*, the persons in question were first cousins, twice removed.

(e) Including, therefore, as Lord Kenyon held, a great niece of the testator.

[1] See further as to the term "cousins ;" *Gregg v. Taylor*, 5 Russ. 22. *Slade v. Fooks*, 9 Sim. 386. *Caldecott v. Harrison*, id. 457.

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 1837.—Collison v. Girling.
 

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[\*63]

\*COLLISON v. GIRLING.

1837; November 28. 1838; November 15.

A testator by his will, dated in 1832, gave to three trustees, upon certain trusts, a sum of 15,000*l.* interest or share in the 3 per cent. consols, to be deemed a legacy of quantity, and to be due at his decease, as if the same were a specific legacy; and he directed, that if he should not die possessed of 3 per cent. consols, sufficient to satisfy the said sum of 15,000*l.* consols before bequeathed, then his executors should within two months after his decease, purchase so much annuities in that fund as should make up the deficiency; and should raise the money required for that purpose out of his real estate. He created a term in his real estates, one trust of which was to raise the full amount, or, as the case might require, the deficiency of the said sum of 15,000*l.* 3 per cent. consolidated bank annuities, in case he should not have at the time of his decease sufficient 3 per cent. annuities in that fund to answer that legacy. At the time of the testator's death in 1835, he had 3000*l.* consols standing in his name, which had been purchased in 1834; but he had, in 1824, sold out 12,000*l.* consols, which then stood in his name, and paid the produce to his brother, who had mortgaged to him a freehold estate, subject to a proviso for redemption, upon re-transfer into his (the testator's) name, when requested so to do, of 12,000*l.* consols, and payment of interest equal to the dividends in the meantime, and had entered into a covenant for the re-transfer in the terms of the proviso:

Held, that the 12,000*l.* consols secured by the mortgage, was well bequeathed to make up the legacy of the 15,000*l.* 3 per cent. consols.

By an indenture dated the 11th of May, 1824, and made between Nicholas Cobb Collison and Elizabeth his wife of the one part, and William Collison of the other part, reciting that certain freehold estates stood limited to such uses as N. C. Collison and Elizabeth his wife should appoint; and that N. C. Collison was also seised of certain other freehold and certain copyhold estates, as to part in fee, and as to other part for life; and reciting that W. Collison was possessed of 12,000*l.* 3 per cent. consolidated bank annuities standing in his own name, and in his own right, in the books of the Governor and Company of the Bank of England; and that upon the application and request of N. C. Collison, W. Collison sold and disposed of the same, and permitted the whole of the money arising from the sale thereof to be received by N. C. Collison, for his own use, as N. C. Collison did thereby admit and declare, upon the terms that N. C. Collison should, on the request of W. Collison, transfer to him a like sum of 12,000*l.* 3 per cent. consolidated

[\*64] bank annuities, and in the meantime \*should pay to him such a sum or sums of money as should be equal to the intermediate dividends thereof; and reciting that the said sum of 12,000*l.* 3 per cent. consolidated bank annuities had not been transferred by N. C. Collison into the name of W. Collison; but that N. C. Collison had paid to W. Collison the sums which he would have received for the dividends thereof if the same had not been sold; and reciting that N. C. Collison had proposed that the re-transfer of the said sum of 12,000*l.* 3 per cent. bank annuities, and the payment of the intermediate dividends should be secured to W. Collison by a mortgage of the freehold and copyhold estates before mentioned; it was witnessed, that in pursuance and part performance of the said agreement, and in consideration

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that W. Collison sold and disposed of the said sum of 12,000*l.* 3 per cent. consolidated bank annuities which belonged to him, at the request of N. C. Collison, and that N. C. Collison received for his own use and benefit, all the money that arose from the sale of the same, the receipt whereof he thereby acknowledged, and in consideration of ten shillings N. C. Collison and Elizabeth his wife appointed the freehold estates, over which they had a joint power, to W. Collison, for 1000 years, subject to the proviso after contained; and N. C. Collison demised to W. Collison all the other freehold estates, for 1000 years, as to those of which N. Collison was seised in fee, and for ninety-nine years, if he should so long live as to those of which he was seised for life only, subject in each case to the proviso after contained. The deed then contained a proviso, that if N. C. Collison, his heirs, executors, administrators, or assigns should, upon the request of W. Collison, his executors, administrators, or assigns, transfer or re-place, or cause to be transferred or re-placed, into the name or names of W. Collison, his executors, administrators, or assigns, in the books of the Governor and Company of \*the [\*65] Bank of England, the sum of 12,000*l.* 3 per cent. consolidated bank annuities, and should in the meantime, and from time to time, until the said sum of 12,000*l.* 3 per cent. consolidated bank annuities should be transferred or re-placed as aforesaid, pay and make good to W. Collison, his executors, administrators, or assigns, such sum and sums of money as should be equal to all dividends or produce which he, W. Collison, his executors, administrators, or assigns would have received, or been entitled to receive, in respect of the said sum of 12,000*l.* 3 per cent. consolidated bank annuities so sold and disposed of as aforesaid, in case the same had remained standing in his or their name or names in the books aforesaid, and should pay and make good the said sum and sums of money, on the day or respective days on which the said dividends or produce would have become due or payable, to W. Collison, his executors, administrators, or assigns, and without any deduction or abatement, on any account whatsoever, then and in such case the indenture now in the course of being stated, and the terms and estates thereby created, should cease, determine, and be void. And N. C. Collison then covenanted to surrender the copyhold property to the use of W. Collison, his heirs and assigns, subject to provisos to be contained in the surrenders, similar to the before-mentioned proviso for determining the before-mentioned three several terms of years. N. C. Collison also covenanted that he, his heirs, executors, administrators, or assigns would, on the request of W. Collison, his executors, administrators, or assigns, transfer, or cause to be transferred or re-placed unto or into the name or names of W. Collison, his executors, administrators, or assigns, the said sum of 12,000*l.* 3 per cent. consolidated bank annuities and also would pay or cause to be paid to W. Collison, his executors, administrators, and assigns, all and every sum and sums of money, \*mentioned in and intended to be secured by the indenture, now in [\*66]

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the course of being stated, according to the true intent and meaning thereof, and of the proviso therein-before contained.

The surrenders of the copyholds were duly made.

N. C. Collison never transferred the 12,000*l.* 3 per cent. consolidated bank annuities into the name or names of W. Collison, his executors, administrators, or assigns.

W. Collison, by his will, dated the 2d of January, 1832, gave to his nephew, the plaintiff, Henry Collison, the second son of N. C. Collison, and the defendants, William Girling, and John Carter, "a sum of 15,000*l.* interest or share in the joint stock of 3 per cent. consolidated bank annuities, to be deemed a legacy of quantity, and to be due at my death as if the same were a specific legacy," upon trust for his sister Mary Edgar, widow, for her life, for her separate use; and after her death, upon certain trusts for the benefit of his sister's three children and their issue; and in case of such failure of their issue as in the will mentioned, then in trust for his nephew, the defendant John Collison, the eldest son of N. C. Collison, his executors and administrators. And he gave to Henry Collison, William Girling, and John Carter, the sum of 3400*l.* reduced 3 per cent. annuities, to be deemed a legacy of quantity, and to be due at his death as if the same were a specific legacy, upon trust for Jane George, the wife of John George, for her life, for her separate use; and after her decease, upon certain trusts for her children, as therein mentioned.

The will contained the following clause: viz. "And my will further is, that if I shall not die possessed of 3 per cent. consolidated and 3 per cent. reduced bank annuities, sufficient from any or both of those funds to answer and satisfy the said sum of 15,000*l.* 3 per cent. consolidated bank annuities, and 3400*l.* reduced 3 per cent. annuities, hereinbefore bequeathed, then I direct the said William Girling and John Carter, or the survivor of them, his executors or administrators, within two calendar months next after my decease, to purchase so much annuities in the said respective funds as shall make up the deficiency, or the full amount thereof respectively as the case may require, and raise the money for that purpose, with legal interest for the same, upon my real estates, as I have hereinafter more fully explained and empowered them to do. And I subject and charge all my real estates in the said county of Norfolk, both freehold and copyhold, as well as my personal estate, (my personal estate to be the primary fund,) to and with the payment of my debts, and I declare that such part of my personal estate as I have hereinbefore given to the said Henry Collison, William Girling, and John Carter, in trust for the benefit of my sister and the said Jane George, and their respective families, as hereinbefore is mentioned shall be protected and indemnified by my said real estates from contributing to the payment of my debts; and I further subject and charge, according to the regulations hereinafter contained, all my real estates (in exoneration of and without any contribution from my personal estate,) to and with the pay-



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ment of the several legacies, annuities, and sums of money hereinafter given and bequeathed respectively."

The testator, in a subsequent part of his will, created a term of 500 years in his Norfolk freehold estates in favor of Girling and Carter, and declared that the term should be held by them upon a trust declared in the following words, viz., "to levy, raise, and take up \*at interest, within [\*68] two calendar months next after my decease, all such sum and sums of money as will be fully sufficient to make up and raise the full amount, or, as the case may require, the deficiency of the said sum of 15,000*l.* three per cent. consolidated bank annuities and 3400*l.* reduced three per cent. annuities, in case I shall not have at the time of my decease as aforesaid, sufficient three per cent. annuities in both or either of those funds to answer both those legacies;" and upon further trust, by assignment or mortgage of the hereditaments comprised in the term, to raise and take up at interest all such sum and sums of money as should from time to time appear to his executors thereinafter named, or to their executors or administrators, to be requisite to be raised for the payment of his legacies thereinafter bequeathed, and as should be wanted in aid of his personal estate for payment of his debts; and such sum and sums of money should be paid to his said executors, their executors or administrators, to be applied in payment of such legacies or debts; and upon certain other trusts, including a trust to raise such sum, not exceeding 2500*l.*, as his brother Nicholas Cobb Collison should by will appoint in manner therein mentioned, to be raised for the benefit of his three daughters in the will named. The term was directed to cease upon the various events mentioned in the proviso for cesser, one of which was when the said respective sums of 15,000*l.* three per cent. consolidated bank annuities, and 3400*l.* reduced three per cent. annuities, should be fully and effectually invested in the names of his said trustees. The testator gave various specific and pecuniary legacies, including a specific legacy of a sum of 5775*l.* three and a half per cent. annuities, then standing in the names of two trustees, and to which he was beneficially entitled. And he bequeathed all the residue of his personal estate, except the three per cent. consolidated annuities, three per cent. reduced annuities, \*and three and a half per cent. annu- [\*69] ities, wanted to answer the legacies in three per cent. consolidated annuities, three per cent reduced annuities, and three and a half per cent. annuities, which were given, either as legacies of quantity, or otherwise, by his will, after and subject to the payment of his just debts, funeral expenses, and the charges of proving his will, to the plaintiff, (Henry Collison,) his executors and administrators; and he appointed the plaintiff sole residuary legatee; and he appointed his brother, Nicholas Cobb Collison, and William Girling, John Carter, and George Cooper, his executors.

The testator died on the 19th of July, 1835, and his will was proved by • Girling, Carter, and Cooper; N. C. Collison having renounced probate.

The only stock standing in the testator's name, at the time of his death,

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was a sum of 3000*l.* three per cent. consolidated bank annuities, which appeared by his banker's book to have been purchased on the 18th of April, 1834; but at the time of making his will, and of his death, he was also entitled to the sum of 5775*l.* three and a half per cent. annuities, standing in the names of two trustees, which has been already mentioned to have been specifically bequeathed by his will.

All the before mentioned facts were stated in the report of the master as the result of inquiries directed by the decree made at the hearing of the cause.

Upon further directions, the Vice-Chancellor declared, that the sum of 12,000*l.* three per cent. consolidated bank annuities secured to be re-invested and due to the testator upon security of the indenture of mortgage of the 11th of May, 1824, must be considered, according to the true intent and [\*70] meaning of the will, as stock of \*which the testator died possessed, and that the same was applicable to the discharge of the legacy of 15,000*l.* like bank annuities bequeathed by the will.

From this declaration the plaintiff appealed, insisting that the mortgage security for the future retransfer of the stock, and the payment of money by way of interest in the meantime equivalent to the dividends thereon, formed part of the testator's residuary personal estate, and belonged to the plaintiff as the residuary legatee, subject only to the payment of the testator's debts, and exonerated from the payment of the legacy of 15,000*l.* stock, as well as of all other charges in his will.

Mr. *Wigram*, and Mr. *Wray*, in support of the appeal, cited the following cases: *Doe dem. Chichester v. Oxenden*, (a) *Pocock v. The Bishop of Lincoln*, (b) *Andrews v. Lemon*, (c) *Jones v. Tucker*, (d) *Jones v. Curry*, (e) *Webb v. Honnor*, (g) *Lewis v. Lewellyn*, (h) *Fraser v. Piggott*. (i)

Mr. *Jacob* and Mr. *Richards*, *contra*, for persons interested in the real estate. Mr. *Wigram*, in reply.

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1838; Nov. 15.—THE LORD CHANCELLOR.—The question upon this appeal is, whether a sum of 12,000*l.* three per cent. consols, which the testator, at the time of making his will, was entitled to have transferred [\*71] red \*to him under an ordinary stock mortgage, is applicable to the payment of a legacy of 15,000*l.* like stock under his will. The Vice-Chancellor's decree has declared that it is. Henry Collison, the residuary legatee, contends that it is not, but that it belongs to him as part of the residue.

It appears from the mortgage deed, stated in the master's report, that in the year 1824 the testator was possessed of 12,000*l.* three per cent. consols, which, upon the application of Nicholas Cobb Collison, was sold, and the proceeds paid to him, upon his undertaking, at the request of the testator, to transfer to him the like sum of 12,000*l.* three per cent. consols, and in the meantime to pay to him such sums as should be equal to the dividends upon

(a) 3 Taunt. 147.

(d) 2 Mer. 533.

(k) 1 Turn. &amp; R. 104.

(b) 3 Brod. &amp; Bing. 27.

(e) 1 Swanst. 66.

(i) Yo. 354.

(c) Cited 4 Dow, 90.

(g) 1 J. &amp; W. 352.

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such stock. The deed then recites, that the retransfer of the stock, and the payment of sums equal to the dividends, should be secured by a mortgage of certain property of the borrower; and it proceeds accordingly to convey the property. The proviso for redemption is upon the mortgagor at the request of the mortgagee, transferring or *replacing*, or causing to be transferred or *replaced*, the stock; and until the same should be *replaced*, paying sums equal to the dividends; and the mortgagor covenants, at the request of the mortgagee, to transfer or cause to be transferred, or replaced, into the name of the mortgagee, the said sum of stock, and to pay the dividends. It is perfectly true that the 12,000*l.* three per cent. consols, which had stood in the name of the testator, passed by this transaction into other hands, and no longer existed in the possession of either the lender or of the borrower; but it is equally true that transactions of this kind are treated and considered as loans of stock, and are so described; and accordingly the mortgage deed in this, as in other such cases, speaks of *retransferring* and *re-* [\*72] *placing* the \*said sum of stock, whereas, in fact, the right of the mortgagee and the obligation of the mortgagor is that a certain new portion of stock should be transferred, or procured to be transferred, by the mortgagor into the name of the mortgagee; but as the arrangement secures to the mortgagee precisely the same amount of pecuniary value, and, upon being completed, will leave him in possession of property, not identically what he had before, but in every other respect the same in specie and value, he naturally considers, that he has not parted with, but only lent his stock; and so considering it scarcely does more violence to the accuracy of language than in speaking of any sum of money lent as the lender's money, as he never expects to receive back precisely the money he advanced, but money of equal value and amount.

In considering the terms of the will, upon which the question turns, the testator must be considered, either as the lender of stock, and therefore the owner of it, as a lending does not change the property in the thing lent, in which case there would be no difficulty, or, at all events, as entitled by contract to have transferred into his name a certain amount of the stock; and it does not appear to me to be very material which supposition is adopted.

The will is dated in 1832, and the testator in the first place gives 15,000*l.* interest or share in the three per cent. consols, which he directs shall be deemed a legacy of quantity, upon certain trusts: then, after disposing of an existing sum in the three and a half per cents., he gives 3400*l.* three per cent. reduced annuities, which he also directs shall be deemed a legacy of quantity, upon certain other trusts. In a subsequent part of his will he directs, that if he should not *die possessed* of three per cent. consols, and three per cent. reduced sufficient from one or both of those funds to an- [\*73] swer and satisfy the said sum of 15,000*l.* three per cent. consols, and 3400*l.* three per cent. reduced, then his executors shall purchase so much as will make up the deficiency, and the money necessary for that purpose



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he directs shall be raised out of his real estate, and creates a term of years for that purpose; and in declaring the trusts of the term, he directs that there shall be raised the full amount, or as the case may require, the deficiency of the said sum of 15,000*l.* three per cent. consols, and 3400*l.* reduced three per cent. annuities, "in case I shall not have, at the time of my decease, as aforesaid, sufficient three per cent. annuities in both or either of those funds to answer both those legacies." By the residuary clause he gives to the appellant all the residue of his personal estate and effects whatsoever and wheresoever, except the three per cent. consols, three per cent. reduced, and three and a half per cent. annuities wanted to answer the legacies in three per cent. consols, three per cent. reduced, and three and a half per cent. annuities. It appears, by the report, that the testator, in 1834, purchased 3000*l.* three per cent. consols, so that with the 12,000*l.* the 15,000*l.* three per cent. consols would be made up; and there is no question but that the legatees of the 15,000*l.* three per cent. consols are entitled to have that sum realized either by purchase out of the general estate or by application of the 12,000*l.*; but the residuary legatee insists that the 12,000*l.* three per cents. due upon the mortgage passes to him under the residuary clause, and that that amount of stock is to be purchased for the legatees by means of money to be raised out of the real estate. Such could not have been the testator's intention. If the covenant in the mortgage deed had been performed, and the stock replaced, the question could not have arisen; and it is not possible to suppose that the testator intended the title of his devisee and residuary legatee to the [\*74] value of such stock to depend \*upon the fact or the accident of such transfer being or not being made. But the question is, Are there words in the will to enable the court to give effect to what must be supposed to have been the testator's intention?

If the testator considered himself, as persons in his situation usually do, as having lent the stock, and therefore as being still owner of it, the expressions used in the will would accurately describe what, upon that supposition, he must have considered as his title and interest in the stock; and there is, I think, strong ground from the expressions of the mortgage deed, for concluding that such was his understanding of his situation with relation to the stock; but if the transaction be considered with the utmost technical accuracy, the testator, when he made his will, held a contract under which he was entitled at any time to require the transfer into his name of 12,000*l.* three per cent. consols, and in the mean time he had all the benefit which could arise from that fund if actually transferred. As against the other party to the contract he had no right except to such transfer; he had no demand for any money: such party was not bound to pay him any, but might have discharged himself from the obligation by making the transfer. If his interest under such contract be not accurately described as stock of which he was possessed, or which he *had*, which are the expressions used, is it more accurately described as personal estate excepting three per cent. consols?

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 1838.—*Collison v. Girling*.
 

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for such are the terms of the residuary clause, and it is between those two gifts that the contest lies.

If a testator having contracted for the purchase of a large quantity of wool, should make his will bequeathing to one person all his personal estate except his wool, and to another all his wool, could there be \*any [\*75] question as to the title to the wool so contracted for, although the party contracting to sell had it not himself but had to procure it to enable him to fulfil his contract? What a party is entitled to under a contract he considers as his own. Lands contracted for will pass by a general devise of all the testator's lands, and of all the lands purchased by him, although he had other lands purchased and actually conveyed; *Atcherly v. Vernon*.(a) Why, then, if a testator contract for the purchase and transfer of a particular description of stock, and then bequeaths all he possesses or has of such stock, is it not to pass? The words of this will would clearly have passed stock standing in the names of trustees for the testator, and yet he would not have possessed or had the stock, in the sense contended for by the appellant; but the words would be construed to include stock to which he was entitled; and if so, the testator in this case was also entitled to the stock.

I am, for these reasons, of opinion that the 12,000*l.* three per cent. consols, secured by the mortgage, is well bequeathed to make up the legacy of 15,000*l.* three per cent. consols; and that the Vice Chancellor's decree is right; and that this appeal must be dismissed with costs.[1]

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 \*PRICE v. DEWHURST.

[\*75]

1838: January 11, 12, 13; November 19.

A husband and wife, who were British subjects, and were domiciled and resident in England, but were jointly entitled to a sum of money secured upon mortgage of an estate in the Danish island of St. Croix, made a joint will according to the Danish law, bequeathing all their personal estate, and afterwards the husband made a sole will, bequeathing all his personal estate, and particularizing, amongst other things, money due on mortgage of an estate in St. Croix, and the wife having survived him also made a sole will bequeathing all her personal estate. The two sole wills were proved in England, but the joint will was not. It appeared in evidence, that for the purposes of transmission the Danish law considers money due upon mortgage of land as personal estate: Held, that the court could not take notice of the joint will, and that the mortgage money passed under each of the sole wills.

Persons who had obtained possession of the mortgage money in question, under color of being personal representatives constituted by the joint will, and beneficially interested in part under that will, and with the assistance of an Executor's Court of Dealing in St. Croix, which appeared to

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(a) 10 Mod. 518. [*Pond v. Bergh*, 10 Paige, 140]

[1] As to bequests of stock. see further, *Banks v. Sladden*, 1 Russ. & M. 217. S. C. Taml. 407. *Sheffield v. The Earl of Coventry*, 2 Russ. & M. 317. *Hayes v. Hayes*, 1 Keen, 97. *Douglas v. Congreve*, id. 410, 424. *Robinson v. Addison*, 2 Beav. 515. *Havard v. Price*, 2 Hare, 98. *Hooking v. Nicholls*, 1 Yo. & Coll. C. C. 478, cited 1 Beav. 410, n. 1.

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 1838.—Price v. Dewhurst.
 

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have had in fact, under the circumstances of the case, no jurisdiction, held to be trustees of the money for the personal representatives of the husband and wife, who claimed under the two sole wills.

Nature and jurisdiction of an Executors' Court of Dealings in St. Croix.

THIS was an appeal from a decree of the Vice-Chancellor. The circumstances of the case sufficiently appear in Mr. Simons' Reports,<sup>(a)</sup> and in the Lord Chancellor's judgment.

The decree declared that the proceedings and decision of the court in St. Croix, called the Executors' Court of Dealing, were void and of none effect against the plaintiff, Ann Akers Price, as the legal personal representative of Henry and Catherine Seaton, and against the plaintiff John Price, as claimant in her right; and the court declared the defendants trustees for the plaintiffs of any estate, right, or interest, in the mortgage they had acquired by virtue of the joint will of Henry Seaton and Catherine his wife, in the pleadings mentioned, or the confirmation thereof, or the proceedings in the Executors' Court of Dealing; and the court declared that the mortgage debt, in the pleadings mentioned to be due from Peter Markoe, and all the securities for the same, passed \*under and by virtue of the will of Henry Seaton, bearing date the 5th of April, 1814, and proved by Catherine Seaton in the Prerogative Court of Canterbury, and also the will of Catherine Seaton bearing date the 2d of July, 1822, and the codicil thereto, dated the 1st of November, 1822, which were respectively proved in the Prerogative Court of Canterbury, and belonged to the plaintiff, Ann Akers Price, as such personal representative as aforesaid; and the court decreed the same accordingly: and it was referred to the master to take an account of all money received by the defendants, Edward Dewhurst the elder, Edward Dewhurst the younger, and Benjamin William Pullau and Catherine his wife, (formerly Catherine Dewhurst, spinster, and afterwards Catherine Akers, widow,) or any of them, in respect of the mortgage, or interest, or of the produce of any estate charged with it, allowing payments properly made in obtaining confirmation of the will, and any sums properly paid in discharge of debts due from Henry Seaton and Catherine Seaton, or either of them; and it was ordered that the balance should be paid to the plaintiffs as such personal representatives as aforesaid. And it was declared, that the last mentioned defendants ought respectively to execute to the plaintiffs, in right of the plaintiff, Ann Akers Price, as such personal representative as aforesaid, all such powers of attorney, deeds, or assignment, or assurance as should be necessary for enabling the plaintiffs to recover, receive, and obtain the full benefit of the mortgage debt and interest, and of the securities for the same; which were ordered to be settled by the master in case of difference, and to be duly executed by the last mentioned defendants, or such of them as the master should direct. And it was ordered that the last named defendants should pay to the plaintiffs their costs of the suit up to the hear-

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ing, to be taxed by the master. Subsequent costs were reserved, and liberty given to apply.

\*The case was very fully argued upon the appeal by Mr. *Wigram* [\*78] and Mr. *Bethell*, for the plaintiffs ; and by Mr. *Jacob* and Mr. *Sharpe*, for the defendants.

The following authorities were referred to in addition to those mentioned in Mr. Simons' Reports :—*Royal Bank of Scotland v. Cuthbert*,(a) *Bempde v. Johnstone*,(b) *Somerville v. Somerville*,(c) *Kennedy v. Cassilis*,(d) *The Attorney General v. Hope*,(e) *Arnold v. Arnold*,(g) *Breadalbane v. Chandos*,(h) Saunders' Reports,(i) *Farquharson v. Seton*,(k) *Fuller v. Willis*,(l) *Lord Portarlington v. Soulby*,(m) *De la Vega v. Vianna*,(n) *Novelli v. Rossi*,(o) Burge on Colonial and Foreign Laws,(p) Huber de Conflictu Legum,(q) Hertius de Collisione Legum, 143 ; Pothier De la Communauté,(r) *Humphreys v. Humphreys*,(s) *Fell v. Lutwidge*,(t) *Farrington v. Clerk*.(u)

Nov. 19.—THE LORD CHANCELLOR :—This case, as raising questions of general interest and of international law, has acquired an importance which the difficulty of those questions does not justify ; for, after a careful examination of the evidence, I am of \*opinion that the decision of it [\*79] must turn upon principles universally recognized, and authorities which cannot be questioned.

The facts are so fully stated in Mr. Simons' report(v) that I abstain from entering into any detail of them. It will be sufficient to explain my view of of the case to state that I consider it clearly proved that the testator Mr. Seaton, was originally of St. Kitts ; that he married the testatrix in that colony, and that they both afterwards resided for many years in St. Croix, a Danish colony ; but that they both came to England in 1805, and lived in this country during the remainder of their lives, Mr. Seaton dying in 1819, and Mrs. Seaton in 1822. Much evidence was adduced by the plaintiff to prove that their domicil was in this country, which was not met by any counter evidence ; and I think that the fact of their domicil having been in England at the time of their respective deaths, must be considered as fully established.

The plaintiff's title is, that Mr. Seaton made a will in 1814, by which he gave to his wife all his property, particularizing money due on mortgage of an estate at St. Croix ; that Mrs. Seaton proved this will ; and by her will of 1822, by which she in terms revoked all former wills, gave the whole of

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| (a) 1 Rose, 462. App.                 | (b) 3 Ves. 198.                       | (c) 5 Ves. 750.           |
| (d) 2 Swanst. 313. et seq. and notes. | (e) 8 Bligh. 44.                      | (g) 2 Mylne & Craig, 256. |
| (h) Ib. 711.                          | (i) Vol. i. p. 275, notes, 5th ed.    | (k) 5 Russ. 45.           |
| (l) 1 Mylne & Keen, 292. n.           | (m) 3 Mylne & Keen, 104.              | (n) 1 B. & Adol. 284.     |
| (o) 2 B. & Adol. 757.                 | (p) Vol. i. p. 55. Vol. iii. p. 1063. | (q) Lib. i. tit. 3, 9.    |
| (r) Art. Prel. ss. 10, 11, 12.        | (s) 3 P. Wms. 349.                    | (t) Barnard. Ch. 319.     |
| (u) 3 Dougl. 124.                     | (v) 8 Sim. 279.                       |                           |

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 1838.—Price v. Dewhurst.
 

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her property to her two daughters, Mrs. Price and Mrs. Hennessy, who both proved her will: that Mrs. Hennessy afterwards died, and Mrs. Price, the plaintiff, having obtained administration to her estate, is now the sole personal representative of Mrs. Seaton, and entitled to all that passed under her will or that of Mr. Seaton.

[\*80] \*Part of the property of Mr. and Mrs. Seaton consisted of a sum of money which Mrs. Seaton's brother, who died in 1801, left to them by a will of 1800, in these words:—"I give and bequeath to my brother Henry Seaton and my sister Catherine Seaton." This money was lent to one Peter Markoe, an inhabitant and proprietor of land in St. Croix, who by an instrument dated the 21st of March, 1805, acknowledged the debt as due to Mr. Seaton, and bound himself to pay the same to him by annual instalments, the last of which would be payable in July, 1813; and, as a security for the due payment and fulfilment of those terms, gave to Mr. Seaton a first mortgage on an estate at St. Croix.

The object of the bill was to have it declared that this money passed under both or one or other of those wills, so as to give the plaintiffs a title to it, and for the consequential directions; and, so far, nothing can be more simple and clear than the plaintiffs' title. But the defendants resist this title, upon the ground that Mr. and Mrs. Seaton, in 1807, and therefore, after they had settled in this country, made a joint will, by which they appointed two of the defendants, Henry Seaton and Edward Dewhurst executors, and disposed of the whole of their property so as to give to these executors and the other defendants interests therein; and that these defendants Henry Seaton and Edward Dewhurst had obtained probate of this will in St. Croix; but of this will no probate has been granted by the Ecclesiastical Court of this country.

The first question which occurs is, how can this court, in administering a testator's property, take any notice of the will of which no probate has been obtained from the Ecclesiastical Court of this country? This court

[\*81] knows nothing of any will of personalty, except \*such as the Ecclesiastical Court has, by the probate, adjudged to be the last will.[1]

The answer, indeed, seeks to get out of this difficulty, by alleging that, by the laws of Denmark in force in St. Croix, money lent upon mortgage of land is, for the purposes of succession, considered as land, and so to call in aid the *lex loci rei sitæ*; and three witnesses were examined by them to prove it. It is unnecessary to consider what course this court would have adopted if that position had been proved, and if it had really been establish-

[1] "It is well settled that we cannot take notice of letters testamentary, or of administration granted abroad, and that they give no authority to sue here. This is not only the law in England, but it has been very generally adopted in this country." *Morrell v. Dickey*, 1 Johns. Ch. Rep. 156. 1 Keen, 271, n. 1., and cases there cited. *Gingell v. Horne*, 9 Sim. 539. *Bain v. Lescher*, 11 Sim. 397.



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ed by evidence to be the law of a foreign country, that a sum of money advanced upon loan, with a personal contract for repayment at stated times, was to be considered as land, and not as part of the personal estate, because the payment was also secured upon land; inasmuch as the witnesses Blechingberg and Guldberg, both advocates of the High Court of Denmark, examined by the defendants themselves, say that moneys secured on mortgage of land within the Danish colonies are looked upon by the Danish law as moveable goods, and refer to an ordinance of 1810. One witness, indeed, Ogaard, an advocate of St. Croix, in answer to the eleventh interrogatory says, (as I understand the deposition,) that the mortgagee's interest after the day of payment must, as a *jus in re*, be considered by the laws of St. Croix as real property; but his reason seems to be because, after failure of payment at the appointed time, he might enter and become the owner of the mortgaged security; and he then says that Henry Seaton might certainly have effectually disposed by his will of the money secured by the mortgage: and in answer to the ninth interrogatory he says, that money secured by mortgage, would, upon the death of the person entitled, descend to the wife and children; but he says that in answering the interrogatories he only refers to property left in the Danish dominions claimed by Danish subjects, and consequently to be \*decided according to Danish laws: and in [\*82] his answer to the fifth interrogatory he also confines himself to Danish subjects. His depositions, therefore, are not intended to apply to the case before me, and he does not say that for the purposes of succession, money lent upon mortgage was by the law of Denmark considered as land, but that as a *jus in re* it must be considered as land; and so it is in this country for certain purposes, as under the mortmain acts. If such had been his meaning, his opinion would have been totally irreconcilable with other parts of his own depositions, and directly contradicted by the evidence of the two other witnesses. I must therefore consider that by the law of Denmark in force in St. Croix, money lent upon mortgage is, for the purposes of succession, considered as personal property or moveables.

If, then, the money in question be personalty, and if the domicil of the testator and testatrix was English, can there be any doubt (if I were at liberty, which I am not, to look at any document as a will except those of which probate has been granted by the Ecclesiastical Court in this country) of the title to this money? The law of the country in which the deceased was domiciled at the time of the death, not only decides the course of distribution or succession as to personalty, but regulates the decision as to what constitutes the last will.[2] That this is the law and practice of the Ecclesiastical Courts of this country appears from many recent decisions, such as

[2] Vide 2 Sim. 7, n. 2. *In the matter of Easton's will*, 6 Paige, 187. *In the matter of Roberts' will*, 8 Paige, 446. S. C. Id. 519.

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*Curling v. Thornton.*(a) In the case of the goods of Maraver,(b) the domicil having been in Spain, the law of that country decided the probate. In *Hare v. Nasmyth*,(c) the property was in England, and the party died there, but the domicil was in Scotland, and the validity of the will was held to depend upon the law of Scotland. The cases of *Stanley v. Bernes*,(d) *Anstruther v. Chalmer*,(e) and other cases referred to by the Vice-Chancellor, are decisions upon the same principle; and in this case the defendant has proved by all his three legal witnesses that the same rule prevails in St. Croix. Blechingberg and Guldberg, speaking of the courts there, say, that "with regard to moveable property, the above-mentioned power of the ordinary dealing court and the extraordinary dealing masters or executors can, in conformity with the law, exist only in the case where the person or persons whose property in consequence of death falls under dealing, have had their fixed abode and home in St Croix. Where this is not the case, the authorities there that are invested with dealing jurisdiction, may, on application from the proper persons concerned, seal up, make inventory of, collect, and transmit the moveable effects, found in St. Croix, to the place where the defunct proprietor resided, but they have nothing to do with the distribution; nor can they pronounce any decision as to the manner of apportionment:" and Ogaard, in the latter part of his deposition to the sixth interrogatory, seems to intend to express the same opinion, as he distinguishes between wills made by Danish subjects, and wills of persons living in foreign countries, which he says it is natural to suppose are made conformable to the laws and institutions of that country; and the dealing and distribution of property takes place there; and therefore he says [\*84] that it is immaterial whether a will made in a foreign country, "disposing of property within the Danish dominions, be confirmed by the King of Denmark or not.

It is in many cases necessary that the courts of the country where the property is found, should grant probate or give authority by letters of administration, for the purpose of giving a legal right to recover and deal with the property; but whether that be effected by granting probate, upon production of an exemplified copy of the will proved where the domicil was, as in *Larpent v. Sindry*,(g) as to the propriety of which Sir John Nichol has expressed doubt, in the *Case of Read*,(h) or by granting probate of a will, inoperative because not made conformably to the laws of the country where the domicil was, or containing provisions contrary to those laws, both these courses of proceeding assume that the laws of the country in which the deceased was domiciled at the time of the death, are to regulate the decision as to what is to be treated as the last will, and the title and distribution under it.

If then the domicil be proved to be English, and if the rule that the law

(a) 2 Add 6.; and see pp. 21, 22; and see *Thornton v. Curling*, 8 Sim. 310.

(b) 1 Hagg. Eccl. Rep. 498.

(c) 2 Add. 25.

(d) 3 Hagg. 373.

, 2 Sim 1.

(g) 1 Hagg. 382.

(h) 1 Hagg. 474.



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of the place of the domicil is to regulate the decision of what was the last will and what are the rights under it be clearly the law of this country, and be proved by the defendants' own witnesses to be the law of St. Croix, upon what can the defendants rest their title in opposition to the will established by the probates of this country? Why solely upon the proceedings of the courts of dealing at St. Croix, by which the joint will has been declared to be the only operative disposition of the property. I abstain from going into an examination of these proceedings, because the \*Vice-Chan- [\*85] cellor has done so much at large, and has, I think, come to a very correct conclusion upon them, so that, if it were necessary, I should have no hesitation in declaring, upon the ground of fraud, that the defendants held the property of which they obtained the possession by these proceedings, upon trust for the parties entitled under the wills proved in this country, for which the course adopted by Lord Hardwicke in *Barnesly v. Powel*,<sup>(a)</sup> would be a more than sufficient authority; but I find another ground, upon the evidence of the defendants, for disregarding those proceedings as deciding any question of property, and that is, that, under the circumstances of this case, the court making those decisions had no jurisdiction whatever in the matter. The passages I have before quoted, from the evidence of the three legal witnesses of the defendants, prove that to be so. They say that the powers of these courts exist only where the persons whose property falls under dealing, have had their fixed abode and home at St. Croix; and when that is not the case, their authority is confined to securing the property and transmitting it to the place where the defunct proprietor resided, and that they have nothing to do with the distribution, and cannot pronounce any decision as to the manner of apportionment.

The defendants, therefore, have themselves proved that the court, upon whose judgment they rest their title, had no jurisdiction. But it is by virtue of that judgment that they have obtained possession of property which belongs to the plaintiffs, as personal representatives of the two wills which have been proved, and I think that there is no doubt but that the title to the property \*in question must depend upon these wills, and [\*86] that the Vice-Chancellor has most properly declared the defendants trustees of what they have so received, and accountable to the plaintiffs as such personal representatives. This displaces the ground upon which part of the petition of appeal rests, namely that the defendants ought to have been directed to account for one moiety only, upon the ground that the joint will is to regulate the title to the property, that is, that a will of which probate has not been granted, is to prevail against two wills of which probate has been granted, and that, in deciding upon the validity of a will and the distribution of personal property, the law of the country where the property happened to be, is to prevail against the law of the country in which the deceased was domiciled at the time of the death, contrary to the estab-

(a) 1 Ves. sen., 119, 284, 287.

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 1838.—*Scott v. Davis.*


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lished law of this country and to the laws of Denmark, as proved by the defendants' own witness.

The absence of Henry Seaton was urged as an objection to the decree ; but that cannot protect the parties who are here, from accounting for what they have received, and the other directions of the decree. The appeal must be dismissed with costs.

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[\*7]

\*SCOTT v. DAVIS.

1838 ; May 9, 10 ; November 21.

A testator bequeathed a sum of long annuities to trustees upon trust for his daughter for life, for her separate use, and after her death, upon trust for such persons as she should by will appoint. One of the trustees purchased of the daughter and her husband the absolute interest in the long annuities, and took an assignment to himself of the daughter's life interest in them, accompanied by what purported to be an execution by the same instrument of her testamentary power over the reversion, with a covenant by the daughter and her husband for quiet enjoyment and for further assurance. It was alleged that the price paid was inadequate : Held that, independently of any question of inadequacy of price, the transaction could not stand ; and upon the daughter's offer, after her husband's death, to repay the consideration money with interest, the deed was set aside.

THE LORD CHANCELLOR :—The plaintiff in this case was entitled under her father's will, to certain interests in a sum of 200*l.* long annuities, which, by the bill, she seeks to have restored to her. By this will, the testator bequeathed the residue of his estate to Sir John Brewer Davis, Thomas Langley, and Leaver Legg, upon trust as to 200*l.* long annuities for his wife, for life, and after her decease, upon trust to pay the annual income thereof, as and when the same should be received, during the life of his daughter, the plaintiff, into her proper hands, or into the proper hand or hands of such person or persons as she should, from time to time, by writing, nominate or appoint to receive the same ; the testator's will being that the annual income of the said long annuities, should be for the sole and separate use and at the free disposal of his daughter, during her life, exclusive and independent of any husband, and so as not to be subject or liable to the debts and engagements, contracts, or intermeddling of any husband ; and her receipt alone, or the receipt of such person as she should nominate or appoint to receive such income, should alone be a sufficient discharge : and after the decease of his daughter, upon trust to transfer the said long annuities unto such person or persons, and in such manner and form, as his said daughter, in and

[\*88] by her last will and testament in \*writing, or any writing in the nature of or purporting to be her last and testament, to be signed and sealed by her alone, whether covert or sole, and notwithstanding coverture, in the presence of two or more credible witnesses, attesting the same,

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should nominate, order, direct, or appoint, and in default thereof, upon trust for the next of kin of the testator.

The deed under which the defendant claims these long annuities against the testator's daughter, bears date the 20th of May, 1815, and the parties to it are John Scott and Elizabeth his wife, the testator's daughter, and Sir John Davis, one of the trustees and executors. It recites the will and the death of the testator's widow, and that Sir John Davis had contracted and agreed with the said John Scott and Elizabeth his wife, for the absolute purchase of the said 200*l.* long annuities, and each of their estate and interest therein, at or for the price or sum of 2500*l.* John Scott and Elizabeth his wife, then assign the said 200*l.* long annuities, and all their right, title, estate, and interest therein, to Sir John Davis, for his own use and benefit, for all the estate, term, and interest of Elizabeth Scott therein. The deed then assumes the form of a will, by which Elizabeth Scott appoints that Sir J. Davis shall and may receive and enjoy the 200*l.* long annuities, so long as the same shall continue payable; and she gives the same to him for his own use and benefit. John Scott and Elizabeth his wife, are then made to covenant that the power is subsisting, and for the quiet possession and enjoyment by Sir J. Davis of the long annuities, against them, their, or either of their appointees or assigns, or any other person or persons whomsoever, and for further assurance.

It appears that 2500*l.* was, at the date of this transaction, considerably less than the value of 200*l.* long annuities according to the then [\*89] price of that stock, the answer, (a) in one part, stating it to be 300*l.*, and in another 400*l.* less than the market price; but this is accounted for from the insecurity of the title beyond the life estate of Mrs. Scott.

I am much relieved at finding what I conceive to be safe and satisfactory grounds for my judgment in this case without particularly adverting to the numerous, and, in many respects, irreconcilable, decisions upon the subject of the powers of a married woman over a fund settled to her separate use, where there are no expressed provisions against anticipation. That the rights of others to deal with a married woman as a *feme sole* are limited by the provisions of the gift to her separate use is the principle of all the equitable jurisdiction upon this subject; and it would seem to be impossible not to see from the terms used by this testator that his intention was, that his daughter should have power only over the income as it accrued; but the decisions seem to require, in such cases a one, that the intention of the testator should be expressed in a particular form of words, and that anticipation should be, in terms, prohibited. My decision of this case will be found to be consistent with the supposition that Mrs. Scott might, under her father's will, have effectually assigned all the future dividends of these long annuities which might have accrued during her life.

(a) Of Horatio Davis, a purchaser from John Henry Davis, to whom the long annuities had been bequeathed by Sir John Davis.

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It is also unnecessary for me to consider how far Sir John Davis's situation as an executor and trustee would have prejudiced his title as a purchaser, if his purchase had been impeachable only on that ground. [\*90] It will be observed that his purchase is of the whole of these long annuities so long as they shall be payable, that is, of Mrs. Scott's life estate, and of so much of the annuities as might be payable after her death, and the consideration is one entire sum.

It is necessary to consider what must have been the object of the testator in making these provisions for his daughter in the form in which he made them, and from thence to ascertain what were the duties of the trustee whom he appointed to protect her enjoyment of them. The authorities perhaps preclude me from assuming that it was his object, and therefore the duty of the trustee, to protect her against any act of herself or of her husband which might deprive her of the future income of these annuities; but they fortunately authorize me in assuming that it was the testator's object, and therefore the duty of the trustee, to secure to her the free uncontrolled dominion over what might remain of these annuities at the time of her death, by a testamentary disposition. The testator, therefore, has not given to her any power to dispose of them by any deed, but only by a revocable instrument; but this object of the testator, to secure which Sir John Davis was appointed a trustee, he has, by every means in his power, endeavored to defeat. He has procured her to make a testamentary disposition, and as far as possible to prevent it ever being revoked. He has made the husband and the wife covenant for quiet enjoyment against any other appointee, or any other persons whomsoever, and for further assurance. Any infirmity in this covenant as against the wife cannot be set up on behalf of Sir J. Davis.

Assuming that Mrs. Scott might be considered as a *feme sole* as to her life estate in the income arising from the long annuities, she could only [\*91] be so considered as to \*so much of the annuities as might be payable after her death to the extent of the power given to her of disposing of them by will, revocable at her pleasure, up to the moment of her death. But the attempt has been to enable her to sell this remaining interest in her lifetime, and so to use the power given to her by her father's will, as to deprive her of the benefit he intended to secure to her. Had this been the only circumstance in the case, I should have felt no difficulty in acting upon it, in the absence of authority; but, in addition to this, it appears that all this was done to effect a purchase by the trustee himself, at a price admitted to be considerably under the market price of the day; and assuming, which however it is impossible to estimate, that this diminution of price was not more than fairly attributable to the infirmity of the title, it was an actual loss of so much to the married woman. The testator's provisions to secure to his daughter the enjoyment of the whole, became, by the act of the trustee whose duty it was to protect her in such enjoyment, the ground of a sacrifice of a considerable part. The

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case of *Parkes v. White*,<sup>(a)</sup> which was not, I think, quoted in the argument, is very similar to the present, and many of the observations of Lord Eldon in that case might be adopted in deciding it. There, indeed, the sale of the life estate was supported because it was a perfectly distinct transaction; but here the whole constitutes but one transaction, and cannot be separated. The defendant, Horatio Davis, says that he is a purchaser for a valuable consideration without notice, and that the plaintiff has confirmed his title; but it is obvious that this defence cannot avail him. His purchase is only of an equity, and the circumstances of the property affected him with notice, if that were necessary; and as to the confirmation, it consists in making other testamentary dispositions in favor of the \*parties claiming [\*92] through the trustee, under the pressure of what had before taken place, and the supposed obligation arising from it; and all these acts are, as I collect, during the coverture. The property, fortunately, from the honorable conduct of the other trustee, Mr. Langley, remained accessible to the plaintiff;<sup>(b)</sup> and I do not hesitate to concur in the decree of the Vice-Chancellor, declaring it to be still subject to the plaintiff's right and equities. The decree, as stated in the petition of appeal, declares that the purchase ought to be set aside "for insufficient consideration." If that forms part of the decree, it must, I think, be altered by striking out those words, as it might be inferred from their remaining in the decree that the transaction was impeachable upon that ground only. Sir J. Davis paid to the husband the purchase money for what, in my opinion, he had no right to take from the wife. The wife, by her bill,<sup>(c)</sup> offers to repay that sum; and the \*decree [\*93] adopts that course. I think that those who claim through Sir J. Davis have reason to be satisfied with this arrangement.

(a) 11 Ves. 209.

(b) The dividends, however, had after the date of the assignment, been paid to Sir John Davis and John Henry Davis, his legatee, until, in the year 1821, they were transferred into the name of the Accountant General of the Court of Chancery, under an order made in a suit instituted by a mortgagee of J. H. Davis, whose mortgage was subsequently satisfied out of the dividends: and in July, 1837, there were standing in the Accountant General's name the 200*l.* long annuities, and 2527*l.* 7*s.* 11*d.* consols, and 175*l.* 16*s.* 6*d.* cash, which had arisen from the dividends.

(c) The offer in the bill was to pay such a sum as with the amount of dividends received by Sir J. Davis or those claiming under him, would make up 2500*l.* with interest. The decree, after declaring that the purchase by Sir J. Davis ought to be set aside for insufficient consideration, and directing the same accordingly, and directing that the assignment and two testamentary confirmations should be given up to be cancelled, referred it to the master to take an account of what was due in respect of the principal and interest, at the rate of 4*l.* per cent. per annum on the sum of 2500*l.* from the 20th of May, 1815, when the purchase by Sir J. Davis was completed, and directed that in taking such account the half-yearly payments of the long annuities from that period should be from time to time applied in discharging the interest, and then in sinking the principal, and that for that purpose the master should make half-yearly rests. The costs of the plaintiff and of the other defendants, except Horatio Davis and J. H. Davis, (who was out of the jurisdiction,) were ordered to be raised and paid out of the consols and cash in court; and the long annuities were ordered to be paid half-yearly to the plaintiff till further order. Further directions and subsequent costs were reserved.



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 1838.—Drever v. Mawdesley.
 

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Many letters are set out in the answer for the purpose of showing that Sir J. Davis only yielded to the entreaties of the husband and wife; and they certainly do show long and repeated attempts to induce him to abandon his duty as a trustee. He resisted for a considerable time, and it is to be lamented that he did not continue to do so. The letters prove the distress of the husband, the effect of that distress, and of the influence of the husband upon the wife, and the endeavors hence arising to get possession, at any sacrifice, of the property intended by the father for the future provision of the wife. All this Sir J. Davis, was appointed trustee to resist, to prevent such sacrifice and to protect such future provision. Unfortunately he failed in this duty, and himself became the purchaser at a price which, without imputing any dishonest motives to him, operated as a loss to the *cestui que trust*. Such a transaction cannot stand; and, providing for the alteration I have directed, I must dismiss this appeal with costs.[1]

Sir *W. Horne*, and Mr. *Gordon*, for the plaintiff.

Mr *Wigram* and Mr. *Allfrey*, for the defendant, Horatio Davis.

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[\*94] \*DREVER v. MAWDESLEY AND OTHERS. DREVER v. MAWDESLEY AND OTHERS.

*By Original Bill and Bill of Revivor.*

1838; March 30.

N. was made a defendant to a cause as a creditor in respect of a debt which he had assigned to trustees, and to recover which he had given them power to use his name. The trustees were not themselves parties to the suit, but they obtained an order authorizing them to appear for him, and to use his name in all proceedings in the cause, and directing that all warrants and proceedings served on his clerk in court, should be forwarded to their solicitor.

Held, that such an order was irregular.

JOHN LEWIS NEWNHAM was made a defendant in these causes, in respect of his claim as a creditor of Thomas Legh, formerly Thomas Crosse, upon certain bonds and other securities. These bonds and securities had been assigned to Thomas Collet and John Derbyshire, as trustees, with power to sue for the amounts due upon them, and to take all necessary proceedings for the recovery of them, and to use Newnham's name for that purpose. An account of Legh's debts had been directed by the decree in the first-mentioned cause, and Newnham's claim was prosecuted in the master's office, by Collet and

[1] That mere inadequacy of price is not alone sufficient to set aside a sale, see 2 Kent's Comm. 477, n. b. *Franklin v. Osgood*, 14 Johns. Rep. 527. *Hawley v. Cramer*, 4 Cow. 741. *Farnam v. Brooks*, 9 Pick. 232. That, as a general rule, a trustee cannot purchase of his *cestui que trust* in the same manner as if he were dealing with a stranger; but that such purchase is allowed, under special and guarded circumstances; see *Davoue v. Fanning*, 2 Johns. Ch. Rep. 258. *Hendricks v. Robinson*, id. 311. *Hawley v. Cramer*, 4 Cow. 718. *Carter v. Palmer*, 1 Dru. & Walsh, 744. *Farnam v. Brooks*, 9 Pick. 213. Pal. Pr. & Ag. (Dunl. ed.) 43, n. m.

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 1838.—*Stocken v. Stocken*.
 

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Derbshire as trustees, but they were not parties to either suit. They presented a petition to the Vice-Chancellor, stating that Newnham obstructed them in the proceedings which they were taking in these suits for the purpose of obtaining payment of the sums due upon the bonds and securities; and upon this petition the Vice-Chancellor ordered, on the 15th of January, 1838, that Collet and Derbshire should be at liberty to appear by their counsel and solicitor for the defendant Newnham, and to use his name in the then present and all future proceedings that should or might be taken in these causes until the further order of the court; and that, for that purpose, all warrants and other proceedings in these causes served on Newnham's clerk in court should be forwarded to the solicitor of Collet and Derbshire, until the further order of the court.

\*The defendant Newnham now appealed from this order. [\*95]

Mr. *Wakefield* and Mr. *Koe*, in support of the appeal.

Mr. *Jacob*, Mr. *Wigram*, and Mr. *Hayter*, *contra*.

THE LORD CHANCELLOR said, that the order was perfectly irregular; and he discharged it accordingly, and gave the appellant the costs of the petition to the Vice-Chancellor upon which the order had been made.(a)

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### STOCKEN v. STOCKEN.

1837; November 24. 1838; July 24.

A covenant to settle on particular persons all the covenantor's personal estate, subject only nevertheless, and without prejudice to any other dispositions, qualifications, or changes, which he should make by his will of or concerning the same or any part thereof, is only a provision for a case of intestacy, and does not prevent the covenantor from bequeathing the whole of his personal estate to other persons.

By a marriage settlement, personal estate was settled, by the father of the wife, in trust for her for life, with remainder to her children, equally, as tenants in common, and in default of a child attaining a vested interest, in trust for the husband, with a direction that after the wife's death the trustees should apply the income at their discretion for the maintenance and education of the children during their minorities.

Held, that after the wife's death, the husband was entitled to require that the income should be applied to the maintenance and education of the children, notwithstanding that he was himself of ample ability to maintain and educate them.

THE facts of this case are stated in 4 Simons, 152, *et seq.*, and 2 Mylne & Keen, 489.

The appeal from the Vice-Chancellor's decree was re-argued before the Lord Chancellor by Mr. *Wigram* and Mr. *Goodeve*, for the plaintiffs; and by Mr. *Bethell* and Mr. *Wood*, for the defendants.

\*The following cases were cited and commented on: *Mundy v.* [\*96]

(a) See *Pentland v. Quarrington*, 3 Mylne & Craig, 249.



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1838.—*Stocken v. Stocken.*


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*Earl Howe*, (a) *Meacher v. Young*, (b) *Chancey's Case*, (c) *Tolson v. Collins*, (d) *Lane v. Dighton*. (e)

1838 ; *July 24.*—THE LORD CHANCELLOR :—The first point arises upon the covenant of *Bettesworth*, which was expressed to be subject to any other dispositions, qualifications, or changes which he might make by his will. The word “changes,” seems by the report of the case before the Vice-Chancellor, (g) to have been treated as if it had been “charges.” (h) *Bettesworth*, by his will, gave the residue of his property to *William Stocken*, and the question is, whether that gift is to take effect, or whether *Bettesworth* had bound himself by this covenant to dispose of the residue for the benefit of his daughter, *Mrs. Stocken*, and her children, the plaintiffs. On the part of the plaintiffs it was contended, that the words of the proviso contained in the covenant only extended to small variations not altering the real object of the previous disposition, which it is said was a disposition of his whole residuary property in favor of *Mrs. Stocken* and her children. It is quite impossible, however, to maintain that proposition, and I think it is quite clear, upon the construction of this covenant, that all *Bettesworth* meant to say was, that if he made no disposition of his property, it should go thus. It was a provision against intestacy, and did not bind him so to dispose of his property. Take the words, “any other dispositions,” by themselves, or even “any other qualifications,” or “any other changes.”

[\*97] \*A man gives to another property, subject to any change or qualification which the donor may make. It is different to say what limits you can set to that power ; but the word “dispositions” is so strong, that it leaves no doubt in my mind that the construction which the Vice-Chancellor put upon the covenant is right.

The next question concerns the rents of the settled estates, which, after the death of the mother, were received by the father ; and the only question as to them is, whether the father was entitled, out of the rents, to have an allowance for the children's maintenance ; the trust being, after the decease of *Mary Ann Stocken*, for all the children of the marriage, in equal shares, as tenants in common, and to be assigned and transferred to them respectively at their respective ages of twenty-one years, if *John Maslin Bettesworth*, *Mary Bettesworth*, and *Mary Ann Stocken* should be then dead ; but if not, then immediately after the decease of the survivor of them ; and the rents and profits in the meantime were to be applied by the trustees, for the time being, in or towards their respective maintenance and education, or the maintenance and education of his, her, or their lawful issue during their minorities, agreeably to the discretion of the several trustees ; and then the deed provides for limitations over between the children. In all the events, it directs

(a) 4 Bro. C. C. 223.

(b) 2 Mylne &amp; Keen, 490.

(c) 1 P. Wms. 408.

(d) 4 Ves. 483.

(e) Ambl. 409.

(g) 4 Sim. 152.

(h) See 2 Mylne &amp; Keen, 489.

1883.—*Stocken v. Stocken*.

that the rents shall “be applied, in the meantime, as aforesaid.” Then comes this provision :—“But if there should be no child of the marriage, or all such children should die before attaining twenty-one years without leaving issue, then in trust to assign and transfer the said leasehold premises unto the said William Stocken, his executors, administrators, and assigns ;—showing, therefore, that the authors of that settlement had in contemplation children of the mother left in minority and the father surviving ; and there is an \*express trust, that after the mother’s death, the trustees should apply [\*98] the rents towards their respective maintenance and education, contemplating the father being alive. It comes therefore, precisely within the principle of *Mundy v. Earl Howe*, which was acted upon in the recent case of *Meacher v. Young*.(a)

The father is, undoubtedly, bound to maintain and educate his children ;(1) but it is competent for a father to contract that certain property shall be applied to those purposes. He did so contract in those two cases, and in this case he makes a similar contract.

I have no doubt, therefore, that the true construction of that provision is, that the father is, as against the debt, viz. the amount of rents and profits due from him, to be allowed a sufficient sum for maintenance and education.

Then it was said that the property was subject to two mortgages, and that the father of the infants had, either out of his own money, or out of the money coming to him from his father-in-law, paid off these mortgages. Now, the children’s property was not the property discharged of the mortgages, but subject to the mortgages ; and, no doubt, the father’s representatives are entitled to an inquiry on that subject if they think fit.

Then as to the inquiry, whether the estate of William Stocken was purchased with rents of his children’s estates, it does not appear to me that there was any reason for that inquiry ; for it is stated in the answer, that he kept no separate accounts, and that he mixed the rents with his own moneys ; and if so, there can be no following of that money into the land. But I \*apprehend neither party can object to this direction, which appears [\*99] to me proper, viz. that in taking the account of rents and profits received by the father, after deducting the expense of the children’s maintenance and education, the master should inquire in what way the surplus of that money was applied or disposed of.

Supposing that the master should find that there was a surplus income of the children beyond what was required for their maintenance and education, it would constitute a debt against William Stocken’s estate ; and if the master

(a) 2 *Mylne & Keen*, 490.

(1) “Whilst the court looks at the duties of the father, it considers those duties as duties that impose upon him thus much, that if he be himself of ability to maintain the children, (be their fortunes what they may,) and to provide for them according to their expectations, it says : ‘you shall provide for them out of your own means, and not encroach upon the property of the children.’” Lord Eldon, *Wellesley v. The Duke of Beaufort*, 2 *Russ.* 28. And see *Thompson v. Griffin*, Cr. & Ph. 317. *Post*, 100 n. [2]

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should also find that that surplus was laid out in the purchase of property which William Stocken has, by his will, given to the infant plaintiffs, then a question of satisfaction may arise. It is, at present, quite uncertain whether there is any debt due from William Stocken's estate or not. The amount of the property is uncertain, and the amount which the children take under their father's will is uncertain. It is obviously, therefore, impossible to come to any decision upon any question of satisfaction. It is at present uncertain, whether there would be any debt to be satisfied; but such a question may arise when it is ascertained what is the amount of the debt, and of the children's benefits under their father's will. It is to be observed, that there is nothing in the will which, as between strangers, would raise a question of satisfaction: whether there is any difference as regards children may be the subject of consideration.

There is no intention on the face of the will to raise a case of election; no election is tendered on the will, and there is nothing else to raise such a question.

These are questions which it will be very material to consider after the master shall have made his report. All cases of satisfaction may raise [\*100] a case of election \*in one sense, though not in the sense in which the word is usually understood in this court.

I see no reason whatever for refusing the children, in this state of the cause, the ordinary accounts against the estate of William Stocken their father.

The decree must therefore be for the accounts against the father's estate—an account of the rents received by him: the master to inquire what would be properly allowed for maintenance and education; and the balance will be the amount of the debt which the plaintiffs, the children, will establish against the father. As to the circumstances under which the mortgages were paid off, and whether the father's estate has any claim to be reimbursed the moneys which he has so paid, the master should inquire; and the master must also inquire and state in what manner the surplus of the rents of the children's estates was applied and disposed of by the father. The usual accounts of the father's estate must be taken; for they are necessary, not only on behalf of the plaintiffs as legatees under the will, but in order to work out the debt.

I thus adjudicate upon all the points which are ripe for decision.[2]

[2] Vide *Thompson v. Griffin*, Cr. & Ph. 317. *Kekewich v. Langston*, 11 Sim. 291. *Hamley v. Gilbert*, Jac. 354, 359. *Matter of Bostwick*, 4 Johns. Ch. Rep. 104. *Thompson v. Brown*, Id 645. *Wilkes v. Rogers*, 6 Johns. Rep. 566. *Allen v. Coster*, 1 Beav. 202, 205. n. 1. A testator bequeathed an annuity to his granddaughter to be applied while she was under age, in and towards her maintenance and education, in such manner as his trustees should, in their absolute and uncontrollable discretion think fit, and whether her father should be able to maintain and provide for her or not. The trustees having made a very small payment on account of the annuity and having made no provision for the maintenance or education of the infant, who had been

1838.—Winter v. Innes.

**\*WINTER v. INNES.**

[\*101]

1838; November 14.

The estate of one of two partners is not, after his death, discharged from a partnership debt by the circumstance that the creditor continues his transactions with the survivor, and forbears, for some years, at the survivor's request, to take any steps to enforce payment of his debt.

*Secus*, where the transactions show that the creditor has accepted the liability of the survivor in discharge of the liability of the partnership.

After the death of one of two partners, the survivor cannot set up the statute of limitations as a bar to a demand against the assets of the deceased. Whether the deceased's representatives can set up the statute, so long as the survivor continues liable to the payment of the debt and the deceased's estate is consequently liable to be called upon by the survivor for contribution, *quere*.

When the master has omitted to report upon one of the questions referred to him, it is irregular to present a petition praying a declaration upon that question. The right course is to except to the master's report. An order upon a petition may be a proper mode of supplying any omission in the directions which the decree has given to the master, but it cannot be the proper mode of supplying any defect or correcting any error in the report.

THE facts of this case sufficiently appear in the judgment.

THE LORD CHANCELLOR.—The bill in this case was filed by persons claiming under the will of the late Mr. Winter, who, up to the time of his death, in the year 1824, carried on the business of a West India merchant, in partnership with the defendant, John Innes; and the object of the bill was to have the estate of Mr. Winter administered, and to have his rights in certain estates purchased on the joint account declared, and to have a settlement made of all the partnership accounts, and, for that purpose, to have an account taken of all debts due to and from the partnership, and payment made out of the partnership property of such debts due from the late partnership.

The cause was heard before the Vice-Chancellor on the 10th of June, 1835. By the decree it was declared, that certain purchased estates were to be considered as partnership property; and that the purchase money unpaid at Mr. Winter's death was a partnership debt; and the master was to take an account of the partnership property at the death of Mr. Winter, and of the debts then due to and from the firm, and an account of \*all debts and [\*102] liabilities due and owing from, or incurred by, the partnership, at the death of Mr. Winter, which had been since paid or satisfied by Mr. Innes, or assumed by him so as to discharge the estate of Mr. Winter; and to inquire whether any and which of such debt or debts still remained due and owing from the partnership, or from Mr. Innes, and to whom, and whether on any and what security or securities.

The master made a separate report, dated the 29th of July, 1837, as to a

wholly provided for by her father, the court declared that, in the event of its appearing that the father had properly maintained and educated the infant from the testator's death, he should receive the whole annuity for the time past, and till further notice; he undertaking properly to maintain and educate her, and to abide by the order of the court. *Stephens v. Lawry*, 2 Yo. & Coll. C. C. 87.

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debt claimed by Alexander Baillie against the partnership; by which, after stating the particulars of the claim in detail, he found that at the time of the death of Mr. Winter, there was due from the partnership to Alexander Baillie the sum of 37,748*l.* 13*s.* 6*d.*; and that 39,499*l.* 4*s.* 3*d.*, with interest at five per cent. from the first of May, 1831, still remained due and owing from Mr. Innes to Alexander Baillie; but the master submitted to the judgment of the court whether the estate and property by the decree declared to be the partnership assets were or not liable to the payment of such debt, or any part thereof; and the master found that Alexander Baillie had no security for his said debt.

Mr. Innes became bankrupt in 1833, and Edward Edwards and Thomas Palmer, the appellants, are his assignees; and they took an exception to this report, by which they admitted that the amount of Mr. Baillie's debt at the death of Mr. Winter, due from the partnership, was as stated by the master, and insisted that the master ought to have reported that the account showing that balance due was taken up and continued by Mr. Innes in several subsequent accounts specified, down to the first of May, 1831, on which day 35,948*l.* 2*s.* 11*d.*, exclusive of the value of certain French stock which had not been purchased, was due; and that such sum, with the value [\*103] of such stock, with subsequent interest, remained due to Mr. Baillie from Mr. Innes, and not from the partnership.

The Vice-Chancellor's order overruled this exception with costs, and declared that the 39,499*l.* was due from the partnership to Mr. Baillie, and confirmed the master's report, and referred it back to the master to compute interest on the 39,499*l.*, and directed him to include in his general report, or in any separate report he might make of debts of the partnership, the amount of what he should so find due for principal and interest to Mr. Baillie. This order was made upon the exception and upon Mr. Baillie's petition; but Mr. Baillie was ordered to pay to the plaintiffs and to the other defendants the costs of that petition.

It was urged at the bar that the master having come to no conclusion, the exception was wrong in form, and was properly overruled. I am not of that opinion. The decree directed the master to inquire and report what debts were due from the partnership at the time of Mr. Winter's death. This he has done, and no objection has been made to his report upon that point; but it also directed him to inquire and report which of such debts had been paid or satisfied by Mr. Innes, or assumed by him so as to discharge the estate of Mr. Winter, and whether any and which of such debts still remained due and owing from the said partnership or from the said John Innes, and to whom. Upon this the master has made no report. He has not even found that the sum reported due from Mr. Innes was composed of the sums due from the firm at the death of Mr. Winter; and if he had, it would have left the principal objects of the inquiry without any answer, inasmuch as Mr. Innes, as surviving partner, must be liable for every partnership debt



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not paid or otherwise satisfied. The \*only important question [\*104] in administering the estate of Mr. Winter, namely, whether that estate had been discharged from the partnership debt or still remained liable to the creditor, would have been, and is, in fact, left untouched by the report. It may be true that upon such a question neither party would probably abide by the opinion the master may have formed; but still the report ought, I think, to have followed out the directions of the decree, and to have stated some conclusion; and not having done so, either party was, I think, at liberty to object to the report for not having stated that conclusion, for which the party objecting contended. I must also observe, that what the master leaves to the court as to the liability of the partnership assets forms no part of the reference, and can only be considered upon further directions. The master was to report as to the partnership debts, and not to prescribe the fund out of which they were to be paid. I also think that the more regular course for Mr. Baillie to have followed would have been to except to the report, for not having found that the debt due to him was due from the partnership, instead of presenting a petition. If there had been any thing to be supplied in the direction under which the master was acting, an order upon a petition might have been the proper remedy; but the inquiries directed by the decree are complete, and an order upon a petition cannot be the proper mode of supplying any defect or correcting any error in the report. The petition prays (and the order made upon it adopts that course) that a certain declaration, may be made; and that, with such declaration, the report may be confirmed; and that directions may be given to the master consequent upon the declaration prayed. Now the declaration prayed to be made by the court is merely of that conclusion to which Mr. Baillie contends the master ought to have come; and the directions prayed \*are only for such further [\*105] proceedings by the master as he must have adopted if he had come to the conclusion so contended for; all which might more regularly have been obtained, supposing the court to have adopted Mr. Baillie's view of the merits, by an exception complaining of the report for not having stated such conclusion. If the master had adopted a conclusion opposite to that contended for, such would have been the proper course, beyond all question: it cannot be less so when the complaint is, that the master has simply omitted to adopt the conclusion contended for. But the petition also prays, and the order directs, that the report shall be confirmed. This assumes that the report is correct. I cannot find any thing in the report which is the proper subject of confirmation. There are some facts stated which are not in dispute—such as the amount of the debt at the death of Mr. Winter—and much evidence stated, upon which the merits of the case must depend; but no result is come to, and no conclusion stated. The inquiries directed are not answered, and there is no finding to be confirmed.

Independently, therefore, of the merits, I am of opinion that the order, so far, at all events, as it confirms the report, and contains directions which are

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in effect, already comprised in the decree, or are the necessary and proper consequences of the directions contained in it, supposing the conclusion upon the merits to which the Vice-Chancellor came to be correct, is irregular. The Vice-Chancellor, indeed, seems to have been strongly impressed, at one time, that the petition was irregular ; and he finally made the petitioner pay the costs of it. I cannot think that any order ought to have been made upon it. If, indeed, there had been any direction to be given, in furtherance of the cause, upon a separate report, a petition might have been the [\*106] proper course ; but that \*is not so in this case. The Vice-Chancellor seems to have thought that the master intended to find that the debt in question was a partnership debt still remaining due and owing from the partnership, that is to say, a partnership debt not paid or satisfied by Mr. Innes, or assumed by him so as to discharge the estate of Mr. Winter, according to the reference. I cannot so understand it ; and I think it clear that the master intended only to state the facts, and to leave the conclusion to the court.

I should have very much regretted, if what I conceive to be an error in bringing the real question before the court had precluded me from giving a judicial opinion upon that question. I think that I am not so precluded, for the reasons I will hereafter explain ; and I therefore now proceed to consider the merits of the case.

The question upon the merits is, whether the 37,748*l.* 13*s.* 6*d.*, admitted to have been due from the partnership at the time of the death of Mr. Winter, still remains a partnership debt, so as to entitle the creditor, Mr. Baillie, to payment out of the estate of Mr. Winter, which is in a course of administration in the cause ; and the question, except as to 5000*l.* directed to be invested in the purchase of French stock, is not put upon any case of payment, but upon the ground that the facts prove that the liability of Mr. Winter's estate has determined ; first, by reason of the transactions between Mr. Baillie and the surviving partner, Mr. Innes ; secondly, by the operation of the statute of limitations.

The result of all the evidence upon the first point, appears to me to be, that Mr. Baillie having, during the lifetime of Mr. Winter, left large sums in the hands of the partnership, did not, after his death, require [\*107] \*payment of such sums, but continued his transactions with the house as he had done before Mr. Winter's death ; that the house consisted only of Mr. Innes, until 1830, when a Mr. Norman was admitted into partnership with Mr. Innes ; for although arrangements were made for the benefit of two of Mr. Winter's sons, which may have made the eldest liable as a partner to the world, Mr. Baillie was a party to the arrangements, and knew that he had not, in fact, the rights or liabilities of a partner as between himself and Mr. Innes : that Mr. Baillie was induced so to leave his property in the hands of the house, that is, of Mr. Innes, partly, perhaps, from kindness towards him, but principally from a desire not to injure the interests of the family of his late friend Mr. Winter, and that he always looked to the settle-



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ment of Mr. Winter's affairs, and the realization of his property, as the means by which and the time at which his debt was to be paid: Mr. Innes, in soliciting his forbearance, continually urging that if payment of the debt were insisted upon, a forced and premature sale of the property would be the necessary consequence, from which much injury would arise to the family. Without this evidence, the case would be simply the continuing the account with the surviving partner, without requiring payment of the balance, for eight years and three months, that is, from November, 1824, the time of Mr. Winter's death, to February, 1833, the time of Mr. Innes' bankruptcy; but this evidence is very important upon the question, whether the creditor had substituted the individual credit of the surviving partner for the joint liability of the firm. A deed of the 26th of October, 1826, is stated in the bill, and was relied upon in argument; but it does not appear to me to affect the present question. To that deed Mr. Baillie was a party, as a trustee named in Mr. Winter's will, and as his executor, although he never proved; and the object was to carry on the cultivation of one of the West India estates, in which Mr. \*Winter and Mr. Innes, and another person, had been [\*108] jointly interested. The debt in question formed no lien upon this estate; and if it had, the deed provides that each party shall discharge all charges and incumbrances affecting his share.

The question, therefore, is, whether a creditor of a firm, who, knowing of the death of one of the firm, continues to deal, as before, with the survivor, for any length of time, without requiring payment of the balance due to him from the firm at the time of the death, thereby loses the remedy which he had in equity against the estate of the deceased partner;—particularly in a case in which there is not only no evidence of any intention to abandon such claim, and to adopt the individual responsibility of the surviving partner in its stead, but the total absence of any object or consideration for so doing, and conclusive evidence that the principal object of the forbearance was not to press upon or prejudice the estate of the deceased, of whose will the creditor was himself a trustee and executor, though he did not prove. It would, I think be extraordinary, if there were authorities to be found in support of the affirmative of this proposition. I will shortly refer to some of the principal cases at law and in equity which bear upon this subject.

The cases at law have necessarily arisen where the dissolution of the partnership has taken place by arrangement between the partners, and not by death. It will be found that, in some, even where it was clear, that the creditor intended to take the separate security of the continuing partner in lieu of the joint liability of the dissolved firm, the retired partner was held not to be discharged, as in *David v. Ellice*,(a) and *Lodge v. \*Di-* [\*109] *cas*,(b) in which the creditor, with a knowledge that the continuing partner had agreed to pay all the debts, took his personal security for the debt;

(a) 5 B. &amp; C. 196.

(b) 3 B. &amp; Ald. 611.

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but it was held that he had not thereby released the retiring partner, upon the ground of want of consideration for his so doing. These decisions have been considered as carrying the doctrine very far, and undoubtedly they do ; and the true ground appears to me to have been acted upon in *Bedford v. Deakin*,<sup>(a)</sup> and *Thompson v. Percival*.<sup>(b)</sup> In the former, it is laid down, that, to discharge the retiring partner, it must appear that the creditor accepted the separate security of the continuing partner, in discharge of the joint debt ; and in the latter case, although the creditor knew that the continuing partner had agreed to pay all debts, and, with that knowledge, had taken a bill from him, for the payment of which, when due, he afterwards allowed two months, yet the court, upon a motion for a new trial, ordered it, that it might be put to the jury whether the plaintiff had agreed to take, and did take, the bill, in satisfaction of the joint debt.

If therefore, the cases in equity of claims against the estates of deceased partners are to be regulated by the same principle, there can be no doubt of the right conclusion in the present case, for there was no new security given ; and instead of an intention appearing, or any agreement being proved, to release the estate of Mr. Winter, all the evidence proves directly the reverse. It cannot be disputed now that the estate of a deceased partner is liable in equity to the creditors of the firm, although the legal remedy exists only against the survivors. When and by what means is that liability to [\*110] terminate? \*Sir William Grant in *Vulliamy v. Noble*,<sup>(c)</sup> (and he had much considered the question in *Sleech's Case* in *Devaynes v. Noble*,<sup>(d)</sup>) has answered the question. He says, "The deceased partner's estate must remain liable in equity until the debts which affected him at the time of his death have been fully discharged. There are various ways in which the discharge may take place, but discharged they must be before his liability ceases." The discharge may be by direct payment, or by dealings with the continuing partner operating as payment of the joint debt, or, in the terms of *Thompson v. Percival*, the dealings may arise from the creditor's having agreed to take and taking the security of the survivor in satisfaction of the joint debt ; or there may be an equitable bar to the remedy, for (as Lord Eldon expresses it in *Ex parte Kendall*)<sup>(e)</sup> "As the right stands only upon equitable grounds, if the dealing of the creditor with the surviving partners has been such as to make it inequitable that he should go against the assets of the deceased partner, he will not upon general rules and principles be entitled to the benefit of the demand." In the present case there is a total absence of any such equitable defence to the claim upon the estate of Mr. Winter, as there is of any intention or contract to abandon it. The more modern cases of *Cowell v. Sikes*,<sup>(g)</sup> *Wilkinson v. Henderson*,<sup>(h)</sup> and *Braithwaite v. Britain*,<sup>(i)</sup> in addition to the former authorities, leave

(a) 2 B. &amp; Ald. 210.

(b) 5 B. &amp; Adol. 925.

(c) 3 Meriv. 619.

(d) 1 Mer. 565.

(e) 17 Ves. 514 ; see p. 526.

(g) 2 Russ. 191.

(h) 1 Mylne &amp; Keen, 582 ; see p. 588.

(i) 1 Keen, 206 ; see p. 220.

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no doubt that in this case nothing has taken place which can bar Mr. Baillie's claim, (admitted to have at one time existed,) to compel payment of so much of the debt due to him from the firm as remains unpaid.

\*In saying this I do not forget or mean to omit the consideration of [\*111] the defence, founded upon the statute of limitations. When the simple case shall occur of the representatives of a deceased partner setting up the statute of limitations against a claim by a creditor of the firm, it will be to be considered whether such a defence can prevail whilst the surviving partner continues liable, and the estate of the deceased partner continues liable to contribution at the suit of the surviving partner. If the equity of the creditor to go against the estate of the deceased partner is founded upon the equity of the surviving partner against that estate, it would seem that the equity of the creditor ought not to be barred, so long as the equity of the surviving partner continues, as that would be to create that circuitry which it is the object of the rule to prevent. In *Braithwaite v. Britain*,<sup>(a)</sup> the Master of the Rolls thought that the statute did not operate, although nine years had elapsed. In this case it is not necessary to consider that general question; Mr. Baillie was himself a trustee and executor of the will of the deceased partner, and did not renounce till 1830; and Mr. Innes, who had the property, acted throughout on behalf of the estate of the deceased. And who now set up the statute of limitations? Not the executors of the deceased partner—who are not bound to plead the statute, but may, if they please, pay a just debt, though barrable by the statute—nor any one interested in his estate, but those who stand in the place of Mr. Innes as surviving partner. I think, therefore, that their defence cannot prevail.

I have hitherto considered the case as if there were no distinction between the different parts of Mr. Baillie's demand; and so the Vice-Chancellor has \*considered it; but it appears to me that the 5000*l.* direct- [\*112] ed to be invested in the purchase of French stock, stands upon a very different footing from the rest of the demand. As to the rest, excluding the 5000*l.*, I am of opinion that the estate of Mr. Winter is liable, because the debt remains as it existed at the time of the death;—no new contract made and no new credit substituted. But is it so as to the 5000*l.*? It is to be recollected that Mr. Innes had clearly the power of making any arrangement with the creditor respecting this partnership debt. Any agreement between him and the creditor for the latter to take any new security or any other consideration in satisfaction of the joint debt, would be binding upon both, and would exonerate the estate of the deceased partner. Now Mr. Innes, in his evidence, states that, in November, 1825, it was agreed between him and Mr. Baillie that a certain amount of French stock, equal, at the market price of the day, to 5000*l.*, should be considered as purchased for him with that sum, part of the partnership debt, until it should be convenient for Innes to

(a) 1 Keen, 206; see p. 221.

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purchase the same, and that Mr. Baillie should be credited with what would be the dividends upon such stock, and be debited with the 5000*l.*; which was accordingly done; and in the account delivered to Mr. Baillie the 5000*l.* is so entered, with a memorandum that an investment in the stock would be made thereafter. These arrangements are fully detailed in Mr. Innes' letter of the 23d of January, 1826. The price at which the amount of stock was calculated and credited was 95; and the letter states it to have been arranged at that price, whatever might be the price when the payment should be actually made. To all this Mr. Baillie was a party, and he considered himself as owner of the stock at that price. If the price had risen, the stipulated

amount of stock must have been purchased, although more than [\*113] 5000*l.* would have been required to \*effect the purchase. After all

this had taken place, was Mr. Baillie still creditor for the 5000*l.*?

Had not his title to the payment of that sum been exchanged for a title to the stipulated amount of French stock? There would not be any option; if he was entitled to demand the stock, he could not be entitled to require payment of the 5000*l.* Had he not, in the terms of the judgment in *Thompson v. Percival*, agreed to take the amount of French stock in satisfaction of the 5000*l.*? If the transaction amounted to such an agreement, then so much of the partnership debt was discharged by it. The authority of the surviving partner enabled him to pay or discharge the debt, for that was incident to, and, in fact, part of the contract into which the deceased had entered; but it did not extend to make the estate of the deceased partner liable to any new contract. He had no right or power to subject that estate to the liability to purchase the stipulated amount of French stock, whatever might be the price of it. Mr. Winter's estate can only be liable for contracts to which he was a party. It cannot, therefore, be liable to the new contract for the French stock; and the partnership contract, to which he was a party was, I think, to the extent of the 5000*l.* given up in exchange for, and therefore satisfied by, this new contract.

The result, therefore is, that, in my opinion, Mr. Winter's estate is liable for what was due of the partnership debt at the death of Mr. Winter, and interest upon it at five per cent., considering, in that calculation, 5000*l.* 3*s.* 3*d.* as paid on the 30th of November, 1825.

It remains to be considered by what form of order effect can be given to this judgment. I have already said that I consider the petition of Mr.

[\*114] Baillie as unnecessary and irregular. I propose, therefore, to \*dismiss it with costs, which, as far as relates to the costs, is what the

Vice-Chancellor's order directs. The exception of the assignees complains of what the master has stated, and insists that he ought to have found the whole debt due from Mr. Innes, and not from the partnership, and that the value of the French stock ought to have been reported as due from Mr. Innes, and not from the partnership. This exception I cannot allow—consistently with the opinion I have expressed—as to the general debt, nor as to the value of

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1838.—Winter v. Innes.

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the French stock, because, if the 5000*l.* be considered as 'paid, there can be nothing in question in this cause as to the value of the French stock, or from which it is due ; but neither can I overrule it, because I think it correct in complaining that the master has, by his report, merely stated the facts, and came to no conclusion, and in insisting that the debt ought to be considered as diminished by the estimated value of the French stock.

I think, therefore, that the correct form of order will be to dismiss Mr. Baillie's petition with costs ; and, upon the exception, to refer it back to the master to review his report, with a declaration that so much of the debt by his said report found to have been due from the firm to Mr. Baillie, at the time of the death of Mr. Winter, as shall be found to be now due and owing, together with interest thereon, is to be considered as still due and owing from the partnership, and not to have been assumed by John Innes so as to discharge the estate of the testator, Mr. Winter, (which are the words of the decree,) but that, in taking the account thereof, the sum of 5000*l.* 3*s.* 3*d.* is to be considered as paid and satisfied, and therefore to be deducted therefrom as and from the 30th of November, 1825 ; and let the master include and state in his general report, or in any separate report he may make of the debts of the said copartnership, what he \*shall find to be the amount of such debt, [\*115] according to the directions of the decree in this cause.

I cannot make the parties excepting pay the costs of the exception, as directed by the Vice-Chancellor's order ; and, on the contrary, as some proceeding was necessary from the course adopted by the master to bring the case before the court, and as the exception has led to a decision which was necessary for the prosecution of the cause, I think it reasonable that the costs of it should be paid out of the estate.[1]

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*May 30 ; June 2.*—The *Solicitor-General* and Mr. *James Russel*, for Innes' assignees.

Mr. *Knight Bruce* and Mr. *Sharpe*, for Alexander Baillie.

[1] Vide 2 Russ. 196, n. 1. 1 Keen, 219, n. 1. This court gives relief against the representatives of a deceased partner who has left assets, if the surviving partner be insolvent. And the defendants cannot object a want of due diligence in the creditor, in not prosecuting the surviving partner before insolvency. No delay in this respect, nor lapse of time, nor dealing with the surviving partner, or receiving from him a part of the debt, will amount to a waiver or bar of the claim on the assets of the deceased partner : for it is a joint and several debt, and the assets of the deceased partner remain liable until the debt is paid. Besides, the discharge of the surviving partner under the insolvent act, is a good plea in bar to a suit against him. *Hamersley v. Lambert*, 2 Johns. Ch. Rep. 508.



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1839.—Webb v. The Manchester and Leeds Railway Company.

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**\*116] \*WEBB AND OTHERS v. THE MANCHESTER AND LEEDS RAILWAY COMPANY.**

1839 : April 10, 11, 12, 13 ; May 8.

Principles upon which the court will exercise its jurisdiction over bodies to whom parliament has given powers of making compulsory purchases of land.

*Semble*, that the court will not allow such bodies to avail themselves of their parliamentary powers by taking land which they do not require for a *bona fide* purpose sanctioned by their act of parliament.

*Semble* also, that although an attempt to obtain possession of land has been, in the first instance, made under color of the powers of the act of parliament, when not really required for the *bona fide* purposes of the act, yet if the land afterwards become really necessary or desirable for such *bona fide* purposes, the court will not interfere to prevent its being taken.

THE defendants having carried their railway through a field belonging to the plaintiffs, and thus divided the field into two parts, one of which consisted of three roods and seventeen perches, and having purchased and paid for that part of the field which the railway actually occupied, subsequently, in June, 1838, gave notice to the plaintiffs of their intention to take the piece containing three roods and seventeen perches. The line of the railway had been made to pass through the field in question by means of a cutting ; and the solicitor of the company, having, before the filing of the bill, been applied to to state the purpose for which the company wanted the piece of land containing three roods and seventeen perches, answered, on the 14th of December, 1838, in the following terms :—" The land is wanted immediately for the purpose of providing the company with earth for making the embankment : its further appropriation is not settled. If any part of it should not ultimately be required, the company are bound to offer it to the former possessors, or the owners of the adjoining lands."

The bill was filed on the 22d of December, 1838, to restrain the company from completing the proceedings which they had already commenced for having the value of the piece of land assessed by a jury ; and from taking possession of it : and an injunction to this effect was granted by the Master of the Rolls, on the 24th of December, 1838.

[\*117] \*The company, by their answer, filed on the 16th of March, 1839, admitted that there was no embankment on the land in question, and that, on the contrary, the line of the railway over the field in question was intended to be, and so far as the same had been hitherto formed, had been (as by reason of the nature and situation of the land it must necessarily be) made and formed in cutting : but they stated two purposes for which they required to take the piece of land containing three roods and seventeen perches ; viz., 1st, the employment of the soil in forming an embankment upon a neighboring part of the line ; and, 2dly, the making a greater slope on each side of the cutting ; an alteration, the necessity of which had been ascertained in the month of September, 1838, and had become still more evident by a slip or falling in of the soil on the sides of the railway

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1839.—Webb v. The Manchester and Leeds Railway Company.

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occasioned by the rains of the autumn of 1838; and they alleged that for the purpose of preventing any slip in future it would be necessary to remove the soil from the surface of the land.

After this answer, the defendants applied to the Master of the Rolls to dissolve the injunction, which his lordship did.

The plaintiffs now moved, before the Lord Chancellor, that the injunction might be revived.

The *Solicitor General* and Mr. *Cankrien*, for the plaintiffs.

Mr. *Wigram* and Mr. *Bacon*, for the defendants.

There was some conflicting testimony of engineers as to the necessity of taking the piece of land for the \*purpose of increasing the [\*118] slope; and at the conclusion of the argument,

THE LORD CHANCELLOR said:—I will read the affidavits before I dispose of this case; because, in fact, the whole question turns upon what is represented on different sides by these engineers. Undoubtedly, I cannot sanction a proceeding which shall make me the judge of these engineering questions; but I must look at the affidavits for the purpose of seeing whether this transaction is a *bona fide* proceeding upon the powers given by the act, or whether it is a mere color to cover another object, which there seems some reason to suspect, at least, in the commencement. Although it may be the case that subsequent events have given the company a title which they had not in the beginning, yet if it appears that they have now the right to take this land, I do not think this court will interfere to prevent them exercising that right; but I certainly cannot sanction their judging that the land is necessary for the purpose of the act, in order to enable them to take it for a purpose totally and entirely distinct. As I have already said, I cannot take upon myself to decide on a question of engineering, whether a particular piece of land is, or is not, necessary; but I will look at the affidavits, for the purpose of satisfying myself how far the parties are attempting to take this land for a *bona fide* purpose provided for by the act. The piece of land in question is extremely small, and it is a great pity that the parties cannot come to some arrangement about it. There is another observation, however, I must make; and that is, that I cannot sanction any proceeding by which a party comes here for the purpose of making a better bargain; which, on the part of the solicitor general's clients, I think is not impossible to have been the object of this suit.

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April 13.—THE LORD CHANCELLOR:—I have read these affidavits, [\*119] which leave the real question between the parties in a very unsatisfactory state. If it had not been for some expressions in the affidavit which has been filed on the part of the company, I should have felt very little doubt that they were not entitled to the whole. An engineer, on the part of the company, has sworn that he considers the whole is necessary. Now, if I



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1839.—Webb v. The Manchester and Leeds Railway Company.

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look to what was originally stated as the proposed object of obtaining the earth, namely, that it was wanted for the purpose of making an embankment at a little distance; which was the only reason suggested originally, and which, throughout the last affidavit, is suggested as a principal reason; and when I find that the extent of the land from the line of the railway is greater than is necessary to make the slope, even the most gradual that is suggested ever to be made upon any railway, I have great difficulty in coming to the conclusion upon that affidavit, that the whole of this land is necessary to be taken; and if the affidavit on the other side, on the part of the plaintiffs, had been more specific than it is, and had enabled me to say what part of the land was necessary and what part was not, I think I should have known what was the right course to have been adopted with regard to the question before me, which is, simply, what portion of the land is fairly required, and may be judged to be required, for the purpose of the cutting. I throw out of consideration entirely that which has been abandoned, in fact, at the bar; namely, any case independent of such case as comes within the clause of the act authorizing a purchase. [His lordship then proceeded to examine the allegations in the plaintiffs' affidavits, as to the necessity of taking the land for the purpose of increasing the slope, and continued:—]

[\*120] \*It is impossible to come to any satisfactory conclusion upon that affidavit, as to what portion of the land, according to the deponent's own statement of the practice of engineers, will or will not be necessary for effecting the slope in this particular piece of land. But I am very unwilling to dispose of the case in that state of the evidence, because I think it is of very considerable importance in either view of the case. The contest is, in fact, merely about money. It is quite clear these proprietors cannot want a slip of twenty or thirty yards; therefore the contest is merely about the price. At the same time, it is extremely important to watch over the interests of those whose property is affected by these companies, to take care that the company shall not, in any misrepresentation they may make, if they have made any, be permitted to exercise powers beyond those which the act of parliament gives them, and to keep them most strictly within the powers of the act of parliament. The powers are so large—it may be necessary for the benefit of the public,—but they are so large, and so injurious to the interests of individuals, that I think it is the duty of every court to keep them most strictly within those powers; and if there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers; but they will get none from me, by way of construction of their act of parliament.

Now here we have the exact measurements. Upon the affidavit we have the description of the state of the soil, which is not contradicted on the other side. There seems, therefore, every possible material necessary to enable a scientific person, an engineer, to come to a satisfactory conclusion as to what would be necessary in order to secure the slope to this part of the railway.

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1839.—Stone v. The Commercial Railway Company.

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\*I do not apprehend, therefore, that there will be any difficulty [\*121] whatever in getting the opinion of some person, unconnected with the parties and the work in question, and beyond all suspicion, who, taking the evidence of the facts as they appear upon these affidavits, would inform me what portion of this field, in his opinion, will be necessary to be taken, in order effectually to secure the work in question, that is to say, the cutting; and if the plaintiffs wish to furnish me with any evidence of that sort, I will postpone the further consideration of this case; with liberty for each side to produce to me affidavits upon that point.

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*May 8.*—The question stated by the Lord Chancellor was afterwards referred to an engineer agreed upon by both parties, and he reported that a part only of the piece of land in question was required for the purpose of increasing the slope, and the Lord Chancellor then ordered, upon the application of the plaintiffs, that an injunction should be awarded to restrain the defendants from going before the jury to claim more of the land than was stated in the engineer's report to be necessary.

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\*STONE v. THE COMMERCIAL RAILWAY COMPANY. [\*122]

1839; April 9, 10.

When a company empowered by parliament has given notice to an owner of land to treat for the purchase of a part of it, but the owner and the company cannot agree upon the terms, and the company, therefore, issues a precept to the sheriff to summon a jury to assess the value, the part of the land which is described in the precept as being that of which the jury are to assess the value, must be neither less nor more than that for the purchase of which the owner has already been required by the notice to treat.

THE principal question in this cause was whether or not the defendants, who permanently required part of a yard belonging to the plaintiffs, were compellable to purchase the whole of it. In the precept, however, which the defendants had issued to the sheriff for summoning the jury to assess the value, they had, by feet and inches, and by reference to a plan, described, as being that which they wanted, a part of the yard which did not correspond with that for the purchase of which they had previously required the plaintiffs to treat; for the description and reference in the precept excluded a portion of what had been described, by reference to a plan, in the notice to treat, and included a portion which was not referred to in the notice. The plaintiffs, therefore, in moving, in the terms of the prayer of their bill, for an injunction to restrain the defendants from proceeding upon the precept, and upon any other precept for a similar purpose, and from entering upon the land mentioned or referred to in the precept, objected to the precept, in the first place, upon the ground that it did not correspond with the notice; and they afterwards proceeded to argue the question whether the yard was one

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1839.—*Stone v. The Commercial Railway Company.*

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which, under the provisions of the act of parliament, the company were compellable to purchase in its entirety, if at all.

Mr. *Wigram* and Mr. *Walker*, for the plaintiffs.

Mr. *Jacob*, Mr. *Richards*, and Mr. *Bigg*, for the defendants.

[\*123] \*THE LORD CHANCELLOR:—In considering cases which arise under these acts of parliament, the law which is to regulate the transactions between the parties is found only in the acts themselves; and the first question to be asked is, whether what is intended to be done is in strict conformity with that which the act requires; for, if not, the court will not permit the company to deal with the property, and leave the parties interested in it to take the chance of a decision in their favor after the injury has been committed.

Now, I have no doubt that, in this case, the company have not done that which the act requires. In the first place, in extending the injunction, as I am about to do, so as to prevent proceedings under this precept, I think I am doing nothing more than the Vice-Chancellor has in fact done. The Vice-Chancellor has prohibited the company from proceeding, except with relation to what was included in the notice; and nobody can, by possibility, find out what was included in the notice. Nothing can be more vague.

Two plans have been produced, both coming from the company, which differ very much, and from which no one can tell what is the property to which the notice applies. It would be impossible to ascertain when the parties were on the right side of the line, and when they were on the wrong side. That, of itself, is a very serious objection to the injunction which the Vice-Chancellor has granted; for the court would find it extremely difficult, if not impossible, to treat any party as guilty of a breach of the injunction. But, in looking at the earlier parts of the transaction, I find that this act contains a provision which is similar to that which is contained

[\*124] \*in other acts of the kind, viz., the company, being minded to take particular property for the purposes of the act, are required to give notice to the party whose property it is; and that party is to communicate, within a certain time, to the company, what is the nature of his interest in that property, and what amount he is willing to take as the price of it.

That notice and counter notice having been given, the parties are in a condition to come to an agreement. If they can agree, either as to the whole or as to part, then, so far as that agreement extends, the question is settled. The act uses the words "the lands in question." If the parties agree, the lands become the lands of the company; but if they do not agree, then they are still "lands in question;" and the act provides means by which the value is to be ascertained as to the lands in question. The lands in question, as to which the value is to be ascertained, are the lands mentioned in the notice. The moment the company have given the notice, the relative situation of vendors and purchasers is constituted between the parties, and the value of the property (if the parties cannot agree) is to be ascertained by reference to

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1839.—Stone v. The Commercial Railway Company.

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a jury, to be summoned from the county or district within which the property is situate. I am not called upon now to consider the case which Mr. Jacob has put, of a house standing partly in one district and partly in another. All this property is in one district.

The company give notice of their intention to take certain property, the plan of which is attached to the notice. The line, as shown on the plan runs through the yard and land of the plaintiffs. In that notice the company place themselves in the character of persons contracting to purchase with the plaintiffs. The parties not \*having come to an agree- [\*125] ment, the company resort to that power which the law gives them of bringing the case before a jury; and the course they adopt is to abandon a large part of the land included in their notice, and to include in the precept a large part of it, which was not included in the notice. What reference, then, has the notice to that upon which the company propose to take the opinion of the jury? It is admitted that, as to that part of the land which was not included in their notice, they cannot proceed before the jury. But what are the jury commanded to do? They are commanded to inquire what is the value of the property included in the precept, and that not only by description, but by feet and inches; and they have no authority but to determine the value of the lands comprised in the precept.

The act requires that all the company does shall be preceded by a notice;—a notice of that which is to be the subject of the inquiry before the jury; and if I were to hold that they might exclude from the consideration of the jury part of that which was comprised in the notice, it would be in the power of the company, after having given notice to take particular property, to subdivide that property into as many subjects of inquiry before the jury as they might think fit. I am not, therefore, to consider difficulties that might arise under other circumstances, such as part having been agreed on, and part not. I am to consider the case of one entire notice applying to land within the division from which the jury are summoned.

I find no authority to subdivide the contract, as the company have done in this case, and that without any new notice to the party, who has no means of knowing what it is which is to be the subject of inquiry before the jury. If the company could do that, they would \*not be bound [\*126] to complete their contract, and when the parties came before the jury, the owner might be told that it was not the intention of the company to take the opinion of the jury upon the value of that which was comprised in the notice, but upon the value of a small part of it only; for if they are not bound by the notice, they may take the jury's opinion upon any part of the land, without any intimation to the owner as to what part that is to be.

It is said that, in this case, no inconvenience of that kind would be sustained, because it has appeared in the course of the discussion, here in court, what part of the property the company intended to take; but I apprehend that nobody could tell, before the discussion, what it was as to which the

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 1838.—Hoare v. Johnstone.
 

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opinion of the jury would be asked ; and it is quite obvious, that if the act gives the company the power of doing what they were about to do here, they were not bound to communicate to their opponents what they intended to do ; and if so, they might come to the jury and ask the opinion of the jury as to part of the land with respect to which the other party had no notice.

It is obvious that this power is not within the terms of the act of parliament, and that it is also extremely inconvenient to all persons with whom the company might deal : and the company must find the power within the act of parliament, or they have no right to it at all. The proceeding before the jury must be consistent with the precept, and the precept must be consistent with the notice.

Unfortunately, therefore, the whole of yesterday was occupied in discussing a question upon which I am precluded from entering, because I [\*127] find myself under the necessity of deciding upon the preliminary point. The main question will probably come before me again. I hope it will be borne in mind that I have a very perfect recollection and a very full note of the argument upon it.

Extend the injunction against proceeding under this precept.

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### HOARE v. JOHNSTONE.(a)

1838 ; November 6, 7.

A part of an exception may be allowed, unless it be so specially framed as to prevent such partial allowance.

On the argument of exceptions to the master's report, an objection as to the admissibility of evidence may prevail, although it does not form the subject of an exception.

THIS case came before the court on exceptions to the master's report, and the principal question was, whether two closes, called the Upper Justice and Lower Justice, were comprised in a lease of some property, of the rents of which the master had been directed to take an account.

The master had considered that both the closes were comprised in the lease, and had taken an account of the rents of them, and had charged the defendant with such rents accordingly.

The defendant excepted to the master's report. The first exception affirmed that the master ought not to have certified that the two closes were demised by the lease, such lands not being comprised therein ; the second exception affirmed that the master ought not to have taken an account of the rents and profits of the two closes, "the same not being included in [\*128] the said decree or in the said lease ;" and the third exception affirmed that the master ought not to have charged the defendant with the rent of the two closes, "by reason of the said lands and hereditaments not being contained in the said decree, or comprised in the lease to the defendant."

(a) The reporters are indebted to Mr. Beavan for the note of this case.

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1838.—Gardner v. Lachlan.

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Mr. *Wigram* and Mr. *Elderton* contended, that as it appeared clear that the close called the Upper Justice was included in the lease and decree, it was immaterial, for the purposes of these exceptions, whether the field called the Lower Justice was included or not, as the exceptions must fail, if it was not made out that neither of these closes was in lease. *Pearson v. Knapp.*(a)

The *Solicitor General*, and Mr. *Beavan*, *contra*, cited *Moore v. Langford*,(b) and were stopped, as to this point, by

THE LORD CHANCELLOR, who said that there was no doubt than an exception might be allowed in part, unless it were so specially framed as to prevent it.[1]

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The master, as appeared from his report, had received secondary evidence of a deed, no reason being given for the non-production of the original. No exception had been taken to the report on this ground.

The *Solicitor General* and Mr. *Beavan* objected that this evidence was inadmissible, and must be rejected.

\*Mr. *Wigram* and Mr. *Elderton* insisted, that it was not com- [\*129]  
petent for the defendant to take this objection, since he had not excepted to the master's report on that point; but

THE LORD CHANCELLOR rejected this evidence.

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### GARDNER v. LACHLAN.

1838; May 5; November 21.

A., on behalf of the owner of a ship entered into a charter party with B., by which B. agreed to pay to A., on the owner's behalf, a certain sum for freight. The owner afterwards assigned all the freight accruing under the charter party to C., as a security for a debt; and C. gave notice of the assignment to A. but not to B. The owner having subsequently become bankrupt, it was held that the arrears of freight were not in his order and disposition at the time of his bankruptcy.

Where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assignee, is the party from whom the trader was to have received payment of the money; in other words, the party holding the property at the order and disposition of the trader.

THE defendants, the assignees of John Scott a bankrupt, appealed against the decree made by the Vice-Chancellor in this cause. The argument and judgment in the court below, first on a motion, and afterwards at the hearing, will be found in Mr. Simons' Reports, where the material facts of the case are stated at large.(c)

Sir *W. Horne* and Mr. *Koe*, for the appellants.

Mr. *Jacob* and Mr. *Stevens*, for the plaintiff.

(a) 1 Mylne & Keen, 312.      (b) 6 Simons, 323.      (c) 6 Sim. 407; and 8 Sim. 123.

[1] Vide *Hopkinson v. Bagster*, 1 Yo. & Coll. C. C. 15.



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1838.—Gardner v. Lachlan.

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Mr. *Richards*, for the defendant Lachlan.

The arguments urged in support of the appeal were substantially the same as had been resorted to before the Vice Chancellor.

The following authorities were cited ;—*Schack v. Anthony*, (a) [\*130] *Ryall v. Rowles*, (b) *Jones v. Gibbons*, (c) *Ex parte Kensington*, (d) *Ex parte Monro*, (e) *Ex parte Tennyson*, (g) *Ex parte Richardson*, (h) *Ex parte Newton*, (i) *Ex parte Waithman*, (k) *Smith v. Smith*, (l) *Tibbits v. George*, (m) *Macbeath v. Haldimand*, (n) *Ex parte Alderson*, (o) *Ex parte South*, (p) *Douglas v. Russell*, (q) Abbott on Shipping, p. 163, 5th ed.

Nov. 21.—THE LORD CHANCELLOR :—The facts of this case, being very fully stated in the two reports of it, upon different stages in the court below, (r) need not be again repeated. The only question is, whether the notice, given to Lachlan, of the assignment made to the plaintiff, was sufficient to take the case out of the tenth and eleventh sections of the 21 James I. c. 19, or whether notice ought also to have been given to the Lords of the Admiralty ; for independently of this objection, no question can arise as to the plaintiff's title.

Scott was *bona fide* indebted to the plaintiff, and being pressed for payment, by an indenture of the 13th of August, 1832, he assigned to the plaintiff all the freight that might become due by virtue of a certain charter party under which a ship belonging to him was at that time upon her voyage. On the 27th of the same month of August, notice of the assignment was served by the plaintiff upon Lachlan, to whom the freight was by [\*131] the charter party made payable ; and on the 15th of \*January, 1833, Scott became bankrupt, the ship having completed her voyage in the month of September, 1832.

The whole question turns upon the charter party, and the rights and liabilities of the parties under it. It is an instrument under seal, dated the 20th of March, 1832, and the parties to it are the Commissioners of the Navy and the defendant Lachlan ; who is described, indeed, as acting for and on behalf of the owners, but he only is the party to it. Lachlan, on behalf of the owners, thereby enters into all the necessary covenants and agreements ; and in consideration of the covenants and conditions being performed by Lachlan on behalf of the owners, the Commissioners, on behalf of his Majesty, covenant and agree to pay to Lachlan, on behalf of the owners, certain freight ; one-half to be paid by the Lords of the Treasury upon certificate of the ship having sailed, and the remainder by the Lords of the Treasury, upon the production of proper certificates of the voyage having been com-

(a) 1 M. &amp; S. 573.

(b) 1 Ves. sen. 348.

(c) 9 Ves. 407.

(d) 2 Ves. B. 79.

(e) Buck, 300.

(g) Mont. &amp; Bligh, 67.

(h) Buck, 480.

(i) 2 Mont. &amp; Ayr. 51.

(k) 2 Mont. &amp; Ayr. 364.

(l) 2 Crom. &amp; Mees. 231.

(m) 5 Ad. &amp; Ellis, 107.

(n) 1 T. R. 172.

(o) 1 Mad. 53.

(p) 3 Swan. 392.

(q) 4 Sim. 524 ; and 1 Mynle & Keen, 4<sup>th</sup> 8.

(r) 6 Sim. 407 and 8 Sim. 1 23.



1838.—Gardner v. Lachlan.

pleted and the conditions performed : and for the due performance of all the covenants and conditions Lachlan bound himself, his heirs, executors, and administrators, unto the Commissioners, in the penal sum of 1000*l*. At the date of the assignment to the plaintiff, part of the freight had been paid ; part was not payable, and notice of the transaction was immediately served by the plaintiff upon Lachlan, but not upon any other person.

When the doctrine was first entertained that debts due to a trader were within the 21 James I. c. 19, it became necessary to lay down some rule by which such property might become capable of a secure assignment. It was considered that the debt, whilst unpaid, was in the order and disposition of the trader, inasmuch as he could demand payment of it when due, or direct \*payment to be made to any other person ; and it was there- [\*132] fore held that notice, authorized by the creditor, to the debtor, of the fact that the debt had been assigned to another, as it prevented it from thereafter being so in the order and disposition of the trader, would prevent the debt from being within the operation of the 21 James I.

Such are the reasons upon which the rule is rested by Mr. Justice Burnet and Chief Baron Parker, in the case of *Ryall v. Rowles*.(a) In *Jones v. Gibbons*,(b) Sir William Grant seems to doubt whether there was sufficient ground to require such notice, but supposes it to have been thought requisite, as otherwise the debtor might safely pay the money to the person who had, without his knowledge, ceased to be his creditor. That such notice to the debtor is necessary, cannot now be questioned ; but the ground of the rule so established rests wholly upon this, that the party to whom the notice is to be given is the party from whom the trader was to receive payment,—in other words, the party holding the property at the order and disposition of the trader, and which order and disposition is, for the future, to cease in consequence of the notice.

Upon this principle, no notice can be necessary to any party from whom the trader is not to receive payment, or who does not hold any property at the order or disposition of the trader. Did, then, the Commissioners of the Navy, the Lords of the Admiralty, or the Lords of the Treasury, stand in this situation in the present case ? It was, it seems, for another purpose, made known who were the owners of the ship ; but for the purposes of the contract Lachlan the broker was the \*only person with [\*133] whom the public officers had any dealings. To him they looked for the performance of the conditions, and to him alone were the payments of the freight to be made. It was obviously more convenient to deal with one known and responsible person than with several unknown owners. Did this charter party give to the owners any right or remedy against these public officers ? The form in which it was made was obviously adopted to prevent any such effect.[1] In *Schack v. Anthony*,(c) and *Lefevre v. Boyle*,(d)

(a) 1 Ves. sen. pp. 361. and 367.

(c) 1 M. & S. 573.

(b) 9 Ves. 407.

(d) 3 B. & Adol. 877.

[1] Vide Paley, Pr. & Ag. 376, and note of Am. ed. Ibid.

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 1838.—Taylor v. Salmon.
 

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the attempts to establish such right, and to enforce a remedy on behalf of the owners, failed ; and these cases prove that no such right or remedy exists. When, indeed, the freight had been paid to Lachlan, he became debtor for the amount. Notice, therefore, was very properly given to him, but was not necessary to any other party. If any cases have required notice, under such circumstances, to any other party, they must have departed from the reasoning upon which the rule is rested in *Ryall v. Rowles* and *Jones v. Gibbons* : but, upon examining the cases cited, I do not find that they have done so.

I am therefore of opinion that the plaintiff is entitled to the freight in question, and that the Vice-Chancellor's decree is right, and that this appeal must be dismissed with costs.[2]

[\*134]

\*TAYLOR v. SALMON.

1838; June 4, 5; November 24.

Decree for the execution of a lease to the plaintiffs, according to the terms of the agreement entered into between the two defendants ; it appearing that one of the defendants who resisted the decree and claimed the benefit of the agreement for himself, acted as agent of the plaintiffs in negotiating the lease from his co-defendant, so that his own intention was immaterial ; and the court being satisfied, moreover, upon the evidence, that the real object and understanding of the contracting parties was an agreement for a lease for the benefit of the plaintiffs.

To a suit by the directors of a joint stock company, on behalf of themselves and all other the shareholders, seeking to have the benefit of an agreement entered into by an agent of the company, it is not necessary that all the shareholders should be made parties.

A person who sets up a title adverse to the company, may be properly made a defendant in such a suit, although he also sustains the character of a shareholder.

THIS was a suit instituted by John Taylor the elder and three other persons, described as directors and copartners of the Dunalley and Tipperary Mining Company, on behalf of themselves and all other the co-partners of the company, against John Salmon and Lord Dunalley. Its object was to obtain a declaration that the plaintiffs and their co-partners, the other members of the company, were entitled, as between themselves and Salmon, to have the benefit of a certain agreement, which Salmon had made with Lord Dunalley, for a lease of such parts of the Dunalley and Tipperary mines as lay under Lord Dunalley's estates in the county of Tipperary, in Ireland, and a declaration that Salmon was a trustee for the plaintiffs in respect of such agreement ; and that Lord Dunalley might be decreed to execute a

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[2] A deed of assignment by way of mortgage, was made of a ship and her cargo. The ship was on her voyage at the time of the assignment ; the parties sent notice of the assignment to the master of the ship, and the master delivered up possession of the ship and cargo to the mortgagees, immediately after her return from the voyage. It was held, that the equitable title of the mortgagees to the cargo was perfected, and could not be defeated by a judgment creditor of the assignee, who afterwards sued out a *fi. fa.* and proceeded to take the ship and cargo in execution. *Langton v. Horton*, 1 Hare, 549.

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 1838.—Taylor v. Salmon.
 

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lease to the plaintiffs, in trust for the company, according to the terms of such agreement.

The bill stated, among other things, that, in making the agreement in question with Lord Dunalley (the terms of which were alleged to be defined with sufficient precision, by reference to the terms of a former lease granted by his lordship to Messrs. Hodgson, and by the subsequent correspondence and dealings of the parties,) Salmon had acted, and so Lord Dunalley well knew, merely as the agent and on the behalf of \*the plaintiff [\*135] Taylor; on the distinct understanding, however, that the benefit of the agreement, when obtained, should be communicated to a joint stock company, which Taylor was then projecting for the purpose of working the mines, and which was shortly afterwards organized and constituted accordingly. The bill further stated that it was part of the arrangement between Taylor and Salmon that the latter should receive a  $\frac{1}{3}$ d share in the proposed joint stock company, by way of remuneration for his services in negotiating the lease with Lord Dunalley.

The bill alleged that the profits and property of this company were, by agreement between themselves, considered as apportioned into 128 shares, which were held accordingly by the plaintiffs and the other members of the company in different proportions as among themselves; that such other members were, in the whole, more than forty persons; and that their number was so great, and the shares in the company (which were transmissible to executors and administrators, and were, under certain restrictions, lawfully transferable) were liable to be so dealt with in the way of trust and transfer, and the persons, therefore, who, for the time being, might be members of the company, were so liable to change and fluctuation, that it was not practicable, without the greatest inconvenience, to make them all parties to the suit; and that to do so would render it in fact impossible to prosecute the suit to a hearing. The bill further alleged that the plaintiffs were the directors of the company, and that by the articles constituting the company, the plaintiffs, as such directors, had the management of its affairs, and were entitled to the custody of all the documents and papers belonging to the company, and had full authority to commence and prosecute the suit.

\*The defendant Salmon, by his answer, among other things, admitted that, on the 6th of June, 1836, an agreement was entered into between himself and Lord Dunalley, which was in the form of a letter addressed by the defendant to his lordship, and a memorandum thereunder written and signed by Lord Dunalley. This letter (which was admitted to have been drawn up and signed by the defendant in the presence of Lord and Lady Dunalley,) together with the annexed memorandum, was as follows:—

“*London, 6th June, 1836. My Lord:—Having induced a company to undertake the working of the mines on your lordship’s estates in the county of Tipperary, Ireland, on the terms mentioned when I had the honor of an inter-*

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1838.—Taylor v. Salmon.

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view with your lordship on the subject, *I now propose for them* on the terms then stated, namely, to render to your lordship one-twelfth of the produce of the merchantable ore on the bank or pit mouth, free to you of all expenses, or paying you the value thereof in money, at your option; you giving the usual rights in mining leases, of making roads and water-courses, erecting forges, houses for engines, machinery, &c. &c.; you giving also the first two years free of all royalties or dues. I have the honor, &c. JOHN SALMON.

"The Right Honorable Lord Dunalley, &c. &c."

"I hereby agree to enter into a lease according to the above proposal, to be drawn by Mr. Barrington upon the first fit time; and said lease to be upon the same terms as that granted by me to Messrs. Hodgson & Co.

"6th June, 1836.

DUNALLEY."

The defendant, by his answer, further said, that Lord Dunalley intended to benefit the defendant exclusively by granting him a lease, and that [\*137] the agreement \*signed by his lordship was expressly made to grant such lease to the defendant, and to no other person. The defendant, by his answer, also insisted that the agreement with Lord Dunalley was made by the defendant in his own name, and on his own behalf, and that he was not to be considered, when he entered into it, as treating as the agent and on the behalf of the plaintiff Taylor, or of the company; and he therefore claimed the exclusive benefit of such agreement, and insisted that the plaintiffs never had any claim or title thereto.

The defendant Lord Dunalley by his answer stated, amongst other things, that he was ready and willing to perform the agreement on his part, and to accept the plaintiffs as the sole lessees thereunder, in trust for the company; but that he was advised that, by reason of the claims set up by the defendant Salmon, he could not do so with safety except under the direction of the court.

The document constituting the agreement was proved as an exhibit, and produced at the hearing of the cause, when it appeared that the words which are before printed in italics were underscored in the original letter.

The decree of the Vice-Chancellor ordered that the defendant Lord Dunalley should execute to the plaintiffs, or to the plaintiff Taylor, in trust for the company, a lease of the mineral property in question, according to the terms of the agreement of the 6th of June, 1836; and that the defendant Salmon should deliver up the agreement to the plaintiffs, and be restrained by perpetual injunction from attempting to enforce such agreement specifically against Lord Dunalley, and from commencing or prosecuting any legal proceedings against the plaintiff Taylor or Lord Dunalley in respect thereof, and that he should pay the costs of the suit.

[\*138] \*The defendant Salmon appealed against the whole of this decree, and by his petition of appeal insisted, among other things, that the suit was defective for want of parties, inasmuch as all the shareholders of the company ought to have been before the court.

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The *Solicitor General*, Mr. *Wakefield* and Mr. *Wray*, in support of the appeal.

Mr. *Wigram* and Mr. *Loftus Wigram*, in support of the decree.

Mr. *Sharpe*, for Lord Dunalley.

The general effect of the evidence by which the plaintiffs' case was established, and the principal topics of argument upon which the appellant relied, are stated and considered in the judgment.

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**Nov. 24.—THE LORD CHANCELLOR:—**I find that, upon the hearing of this appeal, I made the following memorandum in my note book ;— “ I think the judgment must be affirmed. The evidence proves that the contract was on behalf of the company, and the decree leaves untouched any claim which the defendant may have against the company.”

Upon again examining the papers in this case, this opinion has been confirmed. It was well observed at the bar, that as Lord Dunalley does not object to granting the lease to the company, the question is not whether the plaintiffs have made out their case, but whether the defendant Salmon has made out a title to have the lease made to himself in preference to the plaintiffs. I am, however, of opinion that the plaintiffs' evidence proves their own case and disproves that set up by the \*defendant [\*139] Salmon. If Salmon, at the time when he entered into the agreement with Lord Dunalley, was acting as the agent for the plaintiff Taylor, in negotiating for the lease, it is not material whether at that moment he intended that the agreement should be for the benefit of the plaintiff or for his own ; because in either case the plaintiff would be entitled, as against him, to the benefit of the contract ; *Wilson v. Hart* ;(a) *Lees v. Nuttall* ;(b) *Maclean v. Dunn*.(c)

It appears, however, from the evidence, that the idea of taking the lease for his own benefit had not occurred to the defendant until after the agreement had been entered into with Lord Dunalley : for, in his proposal of the 6th of June, 1836, he tells Lord Dunalley that he had induced a company to undertake the working of the mines, and then says, “ I now propose for them,” meaning by the word “ them,” as I understand it, the company, and not, as was contended, the mines. So early as the 1st of December, 1835, the defendant offers to the plaintiff Taylor his services, as agent, to procure for the plaintiff and his friends “ the possession of concerns” to forward their mining undertakings ; and in his letter of the 1st of January, 1836, referring to some works of his own which he offered to the plaintiff, he speaks of parting with a portion of them ; and in the same month John Taylor the younger, (who is the son of the plaintiff Taylor,) having gone to Ireland to inspect the mines,

(a) 1 J. B. Moore, 45.

(b) 1 Russ. & Mylne, 53. This case was affirmed, on appeal, by Lord Brougham, on the 20th of February, 1834.

(c) 4 Bing. 722.



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1883. —Taylor v. Salmon.

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the defendant Salmon told him that he could procure them for the plaintiff, and offered to put him in possession of them. The supposed variance between the evidence of Abraham Francis and John Taylor the younger [\*140] er upon this subject is not material ; both agreeing that the \*defendant offered to procure for the plaintiff the grant of the mines. The letter of the 6th of June, 1836, refers to some prior conversation between the defendant Salmon and Lord Dunalley upon the subject of the mines, which is probably what is alluded to in the deposition of John Taylor the younger ; but that letter also proves that no agreement had been concluded. On the 18th of March, 1836, the defendant Salmon applies to know what the plaintiff Taylor would wish to do about the mines. The mission of the plaintiff Taylor to Ireland followed ; then came the agreement with Lord Dunalley of the 6th of June, which is communicated to the plaintiff Taylor by the defendant by a letter of that day, in which he says, " I have agreed with Lord Dunally, and expect letters of agreement from the other parties daily. His Lordship gave me every assistance to enable me to agree with them." The other parties here referred to were a Mr. O'Brien and a Mr. Newenham, who were proprietors of mines contiguous to those of Lord Dunalley, and which, though not in question in this cause, constitute an important feature in the case by way of evidence : for, as to those mines, it is not in dispute that Salmon was employed by the plaintiff Taylor, and acted as his agent to procure leases for him, and that the whole was to constitute one adventure. Accordingly, the defendant Salmon, in writing to the agents of Mr. Newenham, on the 9th of June, 1836, after speaking of the agreement with Lord Dunalley, goes on to say that the company for whom he, Salmon, was negotiating, were prepared to work a lead vein of Mr. Newenham, upon getting an undertaking from him to perfect a lease of his royalties on the terms agreed upon with Lord Dunalley : and on the 14th of the same month Mr. Newenham states his readiness to let the lead mine to a respectable company. And yet Salmon, in his letter to Mr. Newenham of the 24th of June, speaks of his, Salmon's, taking a lease ; clearly proving, that in this, as in the [\*141] case of Lord \*Dunalley's mine, when speaking of himself, he does not mean himself as dealing for his own benefit, but as negotiating for the others. So in the letter to Mr. Newenham's agents, of the 9th of July, he says, " More than a twelfth I will not give ; the mine will not afford it ;"—though in the same letter he speaks of an offer having been made to Mr. Taylor at a tenth. It is proved that the plaintiffs by their agents, were put into possession of Lord Dunalley's mines in the middle of August, 1836, and commenced working them ; and that the defendant Salmon was informed of that fact at latest in the month of September. Yet, in his subsequent letter, he makes no observation upon it.

Such is the evidence on the part of the plaintiffs (for none was offered by the defendant,) independently of admissions by Salmon at a public dinner, and of his receiving money from the plaintiff Taylor on account of his ex-



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 1838.—Taylor v. Salmon.
 

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penses : and such evidence, I think, clearly makes out the plaintiffs' case ; and that the appellant, if he had been the plaintiff seeking a specific performance against Lord Dunalley and to have the lease executed to him, could not have succeeded.

The appellant, however, sets up certain objections to the plaintiffs' title to a decree ; and first he objects that all the members of the company on whose behalf the bill is filed are not parties to the suit. I have before taken occasion to observe<sup>(a)</sup> that I thought it the duty of this court to adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very \*dif- [\*142] ferent circumstances, decline to administer justice, and to enforce rights for which there is no other remedy.

I am not, however, in this case called upon to act upon this principle, as I find decisions already made which are amply sufficient to support the plaintiffs' right to sue in the form they have adopted. That where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others, is established.[1] This was not disputed : but it was said that the plaintiff ought to have produced the deed constituting this company. I cannot think that necessary, when I find the appellant, in the documents which are in evidence, describing his employers as a mining company, and when it is proved that he stipulated for a  $\frac{1}{3}$ d share.

It was then said that Salmon was to be a shareholder for a  $\frac{1}{3}$ d part, and that the plaintiffs cannot sue on his behalf. But that is confounding the two characters of Salmon, the one of a shareholder,—and as such, the bill is on his behalf ; and the other, that which he has assumed, of a person setting up a title adverse to the company of which he was to be a shareholder. The plaintiffs say that they were to have the lease, and the defendant an interest in the adventure equal to a  $\frac{1}{3}$ d. The defendant says that he was to have the lease, and the plaintiffs some interest in it. Let this issue be tried by the fact, on whose behalf was the derivative interest stipulated for ? On behalf of the defendant, as he admits and insists. But if he was to have the lease, what was the agreement for the derivative interest for the company ?

It was then said that the decree ought to have provided for this derivative interest for the defendant. The decree, however, does not interfere

(a) See *Mare v. Malachy*, 1 Mylne & Craig, 559 ; [*Turner v. Borlase*, 11 Sim. 20.]

[1] Vide *Wallworth v. Holt*, post 619. *Hichens v. Congreve*, 4 Russ. 562, 577, n. 1. *Preston v. The Grand Collier Dock Company*, 11 Sim. 327. *Gray v. Chaplin*, 1 Sim. & Stu. 267, 272, n. 2. *Robinson v. Smith*, 3 Paige, 233. *Walker v. Devereaux*, 4 Paige, 229. *Turner v. Borlase*, 11 Sim. 17. 1 Sim. 44, n. 1. 2 Sim. 387, n. 1. 1 Keen, 33, n. 1. But see *Blain v. Agar*, 1 Sim. 37. *Long v. Yonge*, 2 Sim. 369. *Evans v. Stokes*, 1 Keen, 24. These cases were however anterior in date to the decisions of Lord Cottenham in the case in the text, and in *Wallworth v. Holt*, ubi sup.

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 1838.—*Terrand v. Hamer.*


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[\*143] with or affect the \*interests of the shareholders, *inter se* ; but only decides and directs that the lease shall be granted to them or for their benefit. The statute of frauds was also relied upon by the defendant ; but in the position of these parties that objection cannot prevail, and the defendant has not raised that point by his answer.

I am for these reasons, of opinion that the Vice-Chancellor's decree was right, and I therefore dismiss the petition of appeal with costs.[2]

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### FERRAND v. HAMER AND CURZON.

1838 ; December 17, 22.

The common injunction having issued against one of two defendants for want of answer, the plaintiff afterwards, by an order of course, obtained leave to amend without prejudice to the injunction. Such an order, it seems, is not irregular ; and at any rate cannot be impeached by the defendant against whom no injunction has issued.

THIS was a motion on the part of the defendant Hamer, that an order made, as of course, at the Rolls, giving the plaintiff liberty to amend his bill, without prejudice to the common injunction which he had obtained against the other defendant Curzon, might be discharged for irregularity.

The *Solicitor General* and Mr. *Hetherington*, for the motion.

Mr. *Monro*, *contra*.

The grounds on which the application was rested are so fully stated and considered in the judgment, that any separate report of the argument would be superfluous.

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*Dec. 22.*—THE LORD CHANCELLOR :—In this case the common injunction was obtained against the defendant Curzon for want of his [\*144] answer. \*The defendant Hamer, against whom no injunction was obtained, answered ; and the plaintiff then obtained, at the Rolls, as of course, an order to amend, without prejudice to the injunction. The defendant Hamer now moves to set this order aside for irregularity, contending that, after a common injunction, there can be no amendment without prejudice to the injunction, except upon a special motion.

The defendant, who makes the motion, is not affected by the injunction. As to him, therefore, the order is simply an order to amend. If the practice were, as contended for, it does not appear how the defendant, not restrained, could complain of the order. But if he could, it would strongly exemplify the inconvenience of such a practice. There may be a case of injunction

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[2] A bill may be brought by the present directors of a joint stock company, on behalf of themselves and all others the members of the company, against the former directors of the company, for the purpose of being relieved against a fraud in which all the former directors are alleged to have been involved. *Benson v. Heathorne*, 1 Yo. & Coll. C. C. 326.

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against one defendant only, with which the other defendants may be wholly unconnected, and yet that defendant being subject to an injunction by default, the plaintiff cannot (according to this argument) amend his bill, as against the other defendants, without a special motion, although, as between them and the plaintiff, the motion, when specially made, could not be refused, they having nothing to do with the injunction.

There does not, therefore, seem to be any absolute necessity for determining the general question which has been raised, namely, whether it be a motion of course for a plaintiff, after a common injunction and before answer, to obtain an order to amend his bill without prejudice to the injunction. No case has been found in which this point has been expressly decided : but there are several in which Lord Eldon and Sir John Leach have stated and assumed the practice to be, that by such an amendment the injunction is lost. 'The actual practice is stated to be exactly the reverse, and it is stated that it has been, \*and is, the practice to give, under such circumstances, [\*145] upon motions of course, orders for leave to amend without prejudice to the injunction. If Lord Eldon's opinions had been decisions upon the point, after argument and inquiry into the practice, I should not have hesitated to act upon them : but questions of this kind depend so entirely upon the actual practice, that the *dicta*, even of Lord Eldon, without such argument, ought not to exclude a full investigation of the question.

Although no decisions upon the very point are to be found, there are some acknowledged rules of practice furnishing strong analogies. Many cases prove that, after exceptions to an answer allowed or submitted to, the plaintiffs may amend, as of course, without losing the injunction, and that, although the order be not, in terms, without prejudice to the injunction ; *Mayne v. Hochin*,<sup>(a)</sup> *Adney v. Flood*,<sup>(b)</sup> *Dipper v. Durant*,<sup>(c)</sup> *Sharp v. Ashton*,<sup>(d)</sup> a case which also shows that the practice is different as to a re-amendment.

It is also the undisputed practice, that after a special injunction the plaintiff may amend his bill by motion of course, and not prejudice his injunction ; *Mason v. Murray*,<sup>(e)</sup> *Pratt v. Archer*.<sup>(g)</sup> In *Mair v. Thellusson*,<sup>(h)</sup> and in *Sharp v. Ashton*, it appears that an injunction had been obtained before answer ; it does not appear that any motion was made to amend without prejudice ; but the question as to amending without prejudice arose upon the plaintiff's motion for three weeks further time to answer ; and the plaintiff, upon that motion, asked, that if it should be granted, he might be at liberty to amend his bill.

\*In *Pratt v. Archer*,<sup>(i)</sup> Lord Eldon is represented as having said, [\*146] that where an injunction had issued on account of delay, notice

<sup>(a)</sup> 1 Dick. 255.<sup>(d)</sup> 3 V. & B. 144.<sup>(h)</sup> 3 V. & B. 145, n.<sup>(b)</sup> 1 Mad. 449.<sup>(e)</sup> 2 Dick. 536.<sup>(i)</sup> 1 Sim. & S. 433.<sup>(c)</sup> 3 Mer. 465.<sup>(g)</sup> 1 Sim. & S. 433.

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 1838.—*Ferrand v. Hamer.*


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must be given, and the proposed amendment stated ; but it does not appear whether he is alluding to an amendment before or after answer.

In *Home v. Watson*,<sup>(a)</sup> the question was with respect to the regularity of an order of course for an injunction, upon an amended bill, the injunction upon the original bill having, as it was assumed, been lost by amendment ; but the order to amend was not without prejudice to the injunction.

In *Davis v. Davis*,<sup>(b)</sup> the present Vice-Chancellor assumes that the common injunction is lost by amending, the order not being without prejudice to the injunction ; but whether such order is to be obtained specially or of course is left untouched ; and the same observation applies to what his honor says in the before mentioned case of *Home v. Watson*.

There certainly seems to be an inconsistency in so special an order as an order to amend without prejudice to an injunction being granted upon a motion of course. If an amendment before answer does not prejudice an injunction, the reservation is unnecessary ; and if it could, without a special reservation, it seems strange that the plaintiff should be at liberty to introduce such reservation without the authority of the court. If the motion be of course, those words must have been improperly introduced.

That an amendment affected any injunction seems to have been a [\*147] novel proposition to Mr. Dickens in *Mason v. Murray* ;<sup>(c)</sup> although the immediate question was that of a special injunction ; for no distinction is made by Mr. Dickens or Lord Bathurst between special and common injunctions. And that the rule there laid down was understood as applying to common injunctions, appears from Hinde's Practice (published in 1785, only eight years after the case of *Mason v. Murray*), where there is this passage ;—“ If any injunction hath been obtained for default of appearance or of answer, and plaintiff amend his bill, upon coming in of defendant's answer, defendant must, after answer to the amendments, move to dissolve the injunction *nisi* ; for the injunction is not dissolved by plaintiff's amending his bill, or by defendant's answer thereto ; and if after answer, and before the injunction be dissolved, defendant incur a breach thereof, he may be committed. This was determined in the case of *Mason v. Murray*, per Lord Bathurst.”<sup>(d)</sup> In the Practical Register,<sup>(e)</sup> there is this passage ;—“ Said mending a bill never moves or touches an injunction.” The words “ *Sed quære ?* ” are added, but that is not part of the original work.

In modern cases it is said that the injunction is gone by amending the bill ; but that seems to be inconsistent with the general rule, that an injunction once issued cannot be discharged without an order for that purpose, which is founded upon Lord Bacon's order, and other subsequent orders. Many collateral matters may afford unanswerable grounds for dissolving an injunction, but do not of themselves effect the dissolution. A plea allowed,

(a) 2 Sim. 85.

(d) Page 23.

(b) 2 Sim. 515.

(e) P. 242, Wyatt's edit.

(c) 2 Dick. 536.

1838.—*Ferrand v. Hamer.*

a dismissal of the bill, an abatement of the suit, do not dissolve an injunction ; but an order for that purpose must be obtained, as observed by Mr. Dickens \*in his report to Lord Bathurst in *Mason v. Murray*. It is [\*148] inconsistent with the terms of the common injunction “until answer and further order,” that the injunction should be lost by an amendment of the bill. If the plaintiff’s amendment gave to the defendant a right to have the injunction dissolved, it would seem that he ought to obtain an order for that purpose ; but no such form of order has been produced. *Patton v. Panton*,<sup>(a)</sup> was the case of an amendment after answer ; and an order to dissolve the injunction, upon the ground of the amendment was thought necessary. Some amendments, such as striking out the prayer for the injunction, may make it impossible that the injunction should be continued ; yet it must be generally immaterial what the amendments are, with reference to an injunction for default, the merits of which can never be discussed so long as the default continues

It is the acknowledged practice of the court, as I before observed, that if a defendant, after a common injunction, puts in an insufficient answer, the plaintiff may amend, without prejudice to the injunction, by a common order to amend. Why should a plaintiff who has delayed his amendment till after the defendant has put in an answer, though insufficient, be in a better situation than a plaintiff who takes an earlier opportunity of amending his bill before any answer has been put in ? Suppose several defendants, and a common injunction against all—one answers—and his answer is insufficient—and then the plaintiff amends by motion of course. The injunction clearly continues as against the defendant who has answered ; can it be lost as against those who have not ? The registrars have furnished me with a case in which those circumstances occurred ; *Phillips v. Moule and another*, of the 2d of May, 1822.<sup>(b)</sup> An injunction was there obtained against the defendants to stay proceedings at law ; the defendant Moule put in his answer, to which the plaintiff took exceptions, and the defendant submitted ; and the defendant not having put in his further answer and the other defendant being in contempt for want of his answer, an order was obtained that the plaintiff be at liberty to amend his bill without costs, amending the defendants’ copies, and that the defendant Moule answer the amendments and exceptions at the same time, and that the said amendments be without prejudice to the injunction.

In the state of obscurity in which the printed reports leave this question, I have been desirous of ascertaining what has been the actual practice ; and I am informed by the registrars (all, I believe, with the exception of Mr. Colville,) that they do not find any decided cases upon the point : but (with the exception I before mentioned) they consider the practice to be, that the order to amend before answer, after a common injunction, without prejudice to the

<sup>(a)</sup> 3 Anst. 651.<sup>(b)</sup> Reg. Lib. B. fol. 1017.

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 1838.—*Bowes v. Fernie*.
 

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injunction, is an order of course. I am also informed by Mr. Murray, who has been eighteen years at the Rolls, that when he first came there, he found it to be the constant practice to grant such orders as of course; and that he has ever since continued to give such orders; but that, having understood, about three years ago, that some question had been made as to their regularity, he has, since that time, upon giving such orders, informed the parties applying, that they must take the order at the peril of its being disputed, but that he has not known of any application to discharge any such order.

[\*150] \*This information I must consider to be conclusive as to the actual practice. There is no decision against it, or directly for it; but the analogy between this case and the case of an amendment after an insufficient answer is very strong. From the case of *Mason v. Murray*, it appears that, in the year 1777, no distinction was recognized upon this point between special and common injunctions. No decision of a subsequent date has been produced establishing any distinction, and the practice appears to have been the same as reported by Mr. Dickens in that year. Against this there are *dicta* of the highest authority; but in none of the cases in which those *dicta* are to be found was the point before the court for judgment. There are, indeed, cases in which it seems to have been assumed that the application must be by a special motion, but none deciding that an order as of course for that purpose is irregular.

The motion must be refused, but without costs.[1]

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### BOWES v. FERNIE.

1838; December 13, 14, 17.

Award held bad, and set aside; first, because the arbitrators had awarded on a matter which was not referred to them, and what they had so awarded without authority could not be separated from the other parts of their award; secondly, because they had declined to arbitrate upon certain matters included in the reference.

Principles of the court in dealing with awards.

THIS was a motion on behalf of the plaintiff, (by way of appeal from an order of his Honor the Vice-Chancellor,) that an award made between the plaintiff and the defendant Fernie, in pursuance of an agreement of reference which had been made an order of court in the cause, might be set aside and declared void.

[\*151] \*The award in question bore date the 17th of August, 1838, and commenced by setting forth at large the agreement of reference, which was dated the 31st of May, 1838, and was made between the plaintiff Charlotte Lyon Bowes, commonly called Lady Glamis, of the one

[1] Vide *Pickering v. Hanson*, 2 Sim. 448. *Brooks v. Purton*, 1 Yo. & Coll. C. C. 271. *Warburton v. The London and Blackwall Railway Company*, 2 Beav. 253. 2 Sim. 85. n. 1.



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part, and the defendant Ebenezer Fernie of the other part. The agreement recited (among other things) that Lady Glamis, as the widow and executrix of the late Lord Glamis, in the month of March, 1836, filed her bill of complaint in this cause against the defendant Ebenezer Fernie and others, praying an account of all moneys owing to the defendant by Lord Glamis which was intended to be secured by the indentures of the 11th and 12th of December, 1825, and the other indentures therein mentioned, and which were a charge upon, and ought to have been paid out of, the estates, moneys, annuities, and premises respectively comprised in such indentures: that the releases alleged by Fernie to have been executed by and between him and Lord Glamis might be declared to have been fraudulently obtained, and might be delivered up to be cancelled; and that the account alleged to have been settled between them might be opened: that an account might be taken of all dealings and transactions between Fernie and Lord Glamis; and that an account might also be taken of all moneys received by the defendants Heming and Fernie on account of the arrears of the annuities of 1025*l.* and 444*l.* therein mentioned; and that Heming and Fernie and their co-defendants might be decreed, on payment of what, on taking the aforesaid accounts, should appear to be due to them respectively, to execute proper assignments, transfers, and conveyances of the estates, moneys, annuities, and premises, (except the aforesaid annuity of 1025*l.*) mortgaged to them and charged with their respective debts by the several securities aforesaid: the plaintiff offering to pay what, if \*any thing, should, upon the taking the ac- [\*152] counts, be found due to the defendants respectively; and that if any thing should appear to be due from the defendants, or either of them, they might be decreed to pay the same to the plaintiff respectively.

The agreement further recited that the defendant Fernie had appeared and put in his answer to the bill, and therein, among other things, alleged that he and Lord Glamis, on the 25th of December, 1833, mutually settled all accounts between them; and that upon that settlement a sum of 16,803*l.* 1*s.* was found to be due to Fernie from Lord Glamis; and thereupon, by indentures of release of the 25th of December, 1833, respectively signed and exchanged by and between them, Lord Glamis and Fernie mutually released each other from all claims and demands they then had upon each other, except the said sum of 16,803*l.* 1*s.* so due to Fernie, and the several securities which Fernie then held for better securing the repayment thereof.

The agreement further recited that, under an agreement between Lady Glamis and the defendants Fernie and Heming, dated the 31st of August, 1836, a reference was made to two persons of the names of Western and Donne for the settlement of an account called the *trust account*, in which Heming and Fernie were jointly concerned, and which was part of the subject matter of the suit; and that it was thereby referred to the said arbitrators to take such account; and it was declared that the balance of such account, when found by them, should be an agreed balance between Lady Glamis and

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Heming and Fernie; and such balance, or so much thereof as should be requisite, should be set off by Fernie against the principal sum of 16,803*l.* 1*s.*,

the balance of the aforesaid account settled between him and Lord Glamis on the \*25th of December, 1833, and the sum of 215*l.* 15*s.* 11*d.*, being interest on the sum of 16,039*l.* 12*s.* 7*d.*, part of such balance, from the 25th of December, 1833, to the 31st of August, 1836.

The agreement further recited that the referees Western and Donne by their award, declared that on the 31st of August, 1836, there was due from Fernie to Lady Glamis, as such executrix, on the balance of the aforesaid *trust account*, the sum of 18,762*l.* 14*s.* 10*d.*, which sum they had, in pursuance of the provisions of the said agreement, permitted Fernie to retain as a set-off against the thereinbefore mentioned sums of 16,803*l.* 1*s.* and 215*l.* 15*s.* 11*d.*, the interest thereon to the 31st of August, 1836; and that after deducting the said sum of 18,762*l.* 14*s.* 10*d.* from the aggregate of the two last-mentioned sums, there remained a balance of 192*l.* 2*s.* 1*d.*, which was due to Fernie from the estate of Lord Glamis, on the footing of the account thereinbefore mentioned to have been settled between them as aforesaid.

The agreement then recited that Fernie, acting as the receiver of an estate in the county of Durham, which was in question in a cause of *Braham v. Strathmore*, had received several sums of money which ought to have been credited by him in his account as such receiver, but had not been so hitherto; (through the omission, as Fernie stated, of his clerk, who made out the account;) and inasmuch as the balances of such his receiver's accounts were carried over to the aforesaid *trust account*, if such moneys had been so credited, the balance so carried over to the *trust account* would have been larger, and in farther part discharged the aforesaid debt owing to him from Lord Glamis, and would also have increased the amount of interest calculated and allowed by Messrs. Western and Donne in the said trust account.

[\*154] \*The agreement further recited, that Lady Glamis and Fernie had mutually agreed to compromise the suit, and to terminate all disputes between them by a reference of such suit and disputes to the award, order, and final determination of the two arbitrators therein named, upon the terms and conditions thereafter mentioned. The agreement then set out the terms and conditions, which, so far as they were material with reference to the present motion, were in substance as follows:—That the before mentioned settled account and release of the 25th of December, 1833, should be considered and adopted as a closed and settled account up to that day, and neither party should be at liberty to open the same, or any of the preceding settled accounts, except as after mentioned: that all other matters in difference between Lady Glamis and Fernie, including all claims of Fernie in respect of the several matters therein specified, should be referred to the arbitrators; it being intended that the whole of the accounts between Fernie and Lord Glamis and all differences between the parties in respect thereof, should be finally determined: that a general account should be taken by the

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arbitrators of all Fernie's receipts and payments on account of Lord Glamis or his estate, commencing on the 25th of December, 1833, and adopting the aforesaid balance of 16,803*l.* 1*s.* as the amount due to Fernie on that day, and carrying the same down to the 31st of August, 1836, as calculated by Western and Donne, and crediting in discharge of such balance the sum of 18,762*l.* 14*s.* 10*d.* found due by Western and Donne on the *trust account* as aforesaid, and also crediting, if the arbitrators should think proper, such sum for interest on the moneys before mentioned to have been received by Fernie, as the receiver of the Durham estate, as (if the same had been duly credited by him and carried over to the *trust account*) would have been calculated thereon \*by Western and Donne, under the terms of [\*155] the agreement of the 31st of August, 1836: that releases should be executed by each party to the other, and an indemnity be given by Lady Glamis to Fernie against any claim upon him in consequence of his having been a guarantee for Lord Glamis: that Fernie should deliver over to Lady Glamis such deeds and papers relating to the estates, property, and affairs of Lord Glamis, then in his custody or power, as the arbitrators should direct: that the agreement of reference and award should be made a rule of court.

The award, after fully stating the agreement of reference and its recitals, proceeded to adjudge and determine that all disputes and differences between the parties, relative to the matters referred, should thenceforth cease and determine, and that this suit and all actions and proceedings between them, both at law and in equity, should be dismissed and discontinued. The award then stated that the arbitrators having taken an account of all receipts and payments by Fernie on account of Lord Glamis or his estate, commencing on the 25th of December, 1833, and adopting the balance of 16,803*l.* 1*s.* as the amount due to Fernie on that day, and carrying the same down to the 31st of August, 1836, as calculated by Western and Donne, and crediting in discharge of such balance the sum of 18,762*l.* 14*s.* 10*d.* found due by them on the *trust account*, and including all receipts and payments of Fernie as executor of Lord Glamis, and calculating interest on both sides of the account at 5 per cent. up to the 30th of August, 1836, and thenceforward to the date of the award; and having also taken into consideration the particular payments and claims therein mentioned, and made all proper allowances, there was on the day of the date of that their award, a sum of 3900*l.* 2*s.* 1*d.* due from Lady Glamis to Fernie.

\*And they thereby declared that they had "altogether abstained [\*156] from taking the said Durham account into consideration, and from arbitrating in any way thereupon, the master having, in the said suit of *Braham v. Strathmore*, found a balance of 2020*l.* 11*s.* 3*d.* to be due from the said E. Fernie, and fixed the 3d day of July last for the payment thereof." The award further stated (among other things) that, inasmuch as it was admitted by the parties to the reference that a suit was now pending between R. H. S. Hele and E. Fernie relative to the right to an an-

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nuity of 400*l.* granted by the Earl of Strathmore to R. P. Smith in the year 1815, in order to set aside a purchase thereof made by Fernie, on the grounds of inadequacy of price and fraud, the arbitrators had decided that they were precluded by reason of the suit so pending from deciding on the said last mentioned claim.

The award then proceeded to declare that the arbitrators, "in the making of that their award, had taken into their consideration and estimate the reduction of the salary of the said E. Fernie in the year 1826, and the grounds of it; and they had further taken into their consideration and estimate the pecuniary benefit which had been conferred by the said E. Fernie upon the said Lord Glamis, and his estate, by reason of his having purchased the annuities of Lady Hunloke and Lady Turner and others, on his own responsibility, but for the exclusive advantage of the said Lord Glamis, for which services he had not yet received any adequate compensation, or for the benefit thereby rendered by the said E. Fernie to the said Lord Glamis and to his estate."

The award finally directed that general releases should be executed, [\*157] by each of the parties to the other, "concerning all and every the matters and things so in difference and to the arbitrators referred, on or before the 28th of September then next.

The grounds upon which this award was sought to be set aside were stated in the notice of motion to be,—for objections apparent on the face of the award;—because the arbitrators had adjudicated upon matters which were expressly excluded from their arbitration, and upon matters which were not referred to them; and also because the award was uncertain, and was not final as to the matters arbitrated upon. The particular parts of the award to which these objections applied are stated and considered in the judgment.

Sir *Wm. Horne*, Mr. Serjt. *Talfourd*, and Mr. *Lovat*, for the motion.

Mr. *Knight Bruce* and Mr. *Koe*, in support of the appeal.

In the course of the argument the following cases were referred to;—*George v. Lousley*,(a) *Mitchel v. Staveley*,(b) *Turner v. Turner*,(c) *Samuel v. Cooper*.(d)

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*Dec. 17.*—THE LORD CHANCELLOR :—The objections made to the award in this case may be reduced to two, so far as I think it necessary to observe upon them; first, that the award includes matters not referred, and includes the result of all in one conclusion, so as to render it impos- [\*158] sible to detach the \*matters referred from those which are not referred; and, secondly, that it does not arbitrate upon some subjects in difference, and some of which are expressly referred.

The whole case turns upon the agreement of reference and the award itself, it not being disputed but that these objections, if shown to appear upon the face of the award, are fatal to it.

(a) 8 East, 13.

(c) 3 Russ. 494.

(b) 16 East, 58.

(d) 2 Ad. & Ell. 752.

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1. Under the first head one matter only is relied upon, namely, that the reference being confined to transactions subsequent to the 25th of December, 1833, and to proceed upon the foot of an account settled and a release executed at that date, with certain exceptions which I will presently examine, the award has allowed to Mr. Fernie, the agent, for salary and remuneration, sums exceeding what was allowed to him in the account so settled.

By the settlement of the 25th of December, 1833, a sum of 16,803*l.* 1*s.* was found to be due to Mr. Fernie; and, by an agreement of the 31st of August, 1836, that sum, together with 2151*l.* 15*s.* 11*d.*, interest upon it from the 25th of December, 1833, to the 31st of August, 1836, was agreed to be set off against the sum to be found due from Mr. Fernie upon a *trust account* then agreed to be investigated and settled; and which having been accordingly taken, and the result set off against the 16,803*l.* 1*s.* and 2151*l.* 15*s.* 11*d.*, a balance of 192*l.* 2*s.* 1*d.* was found to be due to Mr. Fernie; so that the settlement of the account in the year 1833, showing a balance of 16,803*l.* 1*s.* due to Mr. Fernie, was the footing upon which the reference now in question was to proceed: and it is quite clear that the arbitrators had no authority to open that settlement for any purpose, and therefore not for the purpose of adding to the "salary or remuneration of Mr. Fernie for any [\*159] period anterior to that settlement, unless the exception before alluded to gave them such authority.

It is, therefore, to be considered, first, whether it appears upon the face of the award that the arbitrators have made any allowance for salary or remuneration to Mr. Fernie for any period anterior to the settlement; and secondly, if it does so appear, whether the exception in the release authorized them so to do.

With respect to the first inquiry, it is stated upon the award, that the arbitrators had, in making their award, (which finds a sum of 3900*l.* due to Mr. Fernie,) taken into their consideration and estimate the reduction of the salary of Mr. Fernie in the year 1826, and the grounds of it; and that they had "further taken into their consideration and estimate the pecuniary benefit which had been conferred upon Lord Glamis and his estate by reason of his (Mr. Fernie's) having purchased the annuities of Lady Hunloke and Lady Turner and others, on his own responsibility, but for the exclusive advantage of Lord Glamis, for which services he had not yet received any adequate compensation, or for the benefit thereby rendered by the said Mr. Fernie to the said Lord Glamis and to his estate." Lord Glamis died soon after the settlement in December, 1833, so that the services and benefit conferred upon Lord Glamis by Mr. Fernie in respect of which the arbitrators, in calculating the sum of 3900*l.* to be due to him, had taken into their consideration and estimate the reduction of the salary in the year 1826, and the want of adequate compensation for such services and benefit, must have been of a date anterior to the settlement and release of the 25th of December, 1833.

"That being the case, Mr. Fernie's claim, if he ever had any, to ad- [\*160]



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ditional salary or compensation for such services, was clearly concluded by the settlement and release; and the arbitrators had no authority to arbitrate upon it, unless the exception in the release gave them such authority. And this appears to have been the ground upon which the Vice-Chancellor thought that the arbitrators had authority to award such additional salary and compensation; and his opinion seems to have proceeded on a supposition that the exception in the release was an exception of any claims which Mr. Fernie might have in respect of certain indentures. The argument, therefore, assumed this form:—The deeds in question, and any claims which Mr. Fernie might have under them, are excepted out of the settlement and release, and the deeds and securities, so excepted, contain provisions under which Mr. Fernie might claim additional allowances.

It appears to me that there is a very conclusive answer to this reasoning. The exception in the release of the 25th of December, 1833, is not of the deeds or of any claim founded upon them, but in these words, “except the said sum of 16,803*l.* 1*s.* so due to the said E. Fernie, and the several securities the said E. Fernie then held for *better securing the re-payment thereof.*” What was due upon those securities and otherwise, up to the 25th of December, 1833, was ascertained and settled, and fixed at the sum of 16,803*l.* 1*s.* upon any account whatever,—including, therefore, salary and remuneration as well as all other heads of claim; and the arbitrators had no more authority to open that account for the purpose of adding to the amount of such salary and remuneration, than to alter the account so settled upon any other ground.

The deed of the 12th of December, 1825, was to secure and indemnify Mr. Fernie against \*any payment or liability to which he might [\*161] be subject in consequence of the transactions referred to. Whatever such payments or liabilities were up to the settlement of the 25th of December, 1833, must have been included in that settlement, and have constituted part of the 16,803*l.* 1*s.*; and the security was to hold good for what was so due at that time, and for future payments and liabilities, but not for any further claim anterior to that time. It would, indeed, be a great absurdity to settle all accounts at, and claims up to, a certain date, and at the same time to except the deed, as to the time past, upon which all such accounts and claims were founded.

But if all the provisions of the deed, from the beginning, had been open to the arbitrators, no provision in it would have authorized them to add to the salary or remuneration of Mr. Fernie for the time anterior to this settlement. The provision in that deed, to which I was referred, against all loss, costs, charges, damages and expenses which Mr. Fernie might pay, expend, incur, or in any manner be put unto, is merely a provision for indemnity against losses to be sustained, and not for remuneration to be received. I am of opinion, therefore, that the case cannot be brought within the exception.

It was argued, that it did not appear that the arbitrators had made any such additional allowance; but that they might have considered the circum-



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stances stated for some other purpose. It is true that the court leans in favor of awards, and would readily adopt a reasonable construction for the purpose of maintaining their validity.[1] But I cannot, for this purpose, go beyond a reasonable construction; and when arbitrators award a certain sum to one of the parties, and say that in "making their award, they had [\*162] taken into their consideration and estimate certain claims of that party for which he had not before received any adequate compensation, it would be contrary to the plain and obvious meaning of the words to assume that they had not included something on account of such claims in the same award. I think, therefore, that, in this respect, the arbitrators have exceeded their authority, and have awarded upon a matter not referred to them, and that what they have so awarded without authority cannot be separated from the other parts of their award.[2]

2. I am also of opinion that they have, upon their award stated that they have declined to arbitrate upon some matters included in the reference; and that the award is therefore bad.

I will first consider the case of the annuity of 400*l.* granted by Lord Strathmore to Mr. Smith. The arbitrators, by their award, in substance decide that they are precluded by reason of a certain suit pending between Mr. Hele, the vendor of the annuity, and Fernie, the real or nominal purchaser, to set aside the purchase of it, from arbitrating on the claim. Upon this the Vice-Chancellor very justly observed that the reason assigned for not arbitrating upon this claim is wholly untenable, but his honor held that this was no objection to the award, because he thought that the claim, if any, was barred by the release. I do not conceive that this court has any thing to do with that consideration. If the claim be barred by the release, the arbitrators would have been well justified in deciding against the claim upon that ground. But they state that what they have done is, not to decide against the claim, but to decline arbitrating upon it at all, thinking that they were precluded from so doing. The party making the claim had "a right to [\*163] the judgment of the arbitrators upon it; and I cannot see upon what ground this court is entitled to say, "You, the arbitrators, ought to have investigated the claim, and decided upon it; but the court being of opinion that, if you had done so, you must have decided against the claim, the objection to the award shall not prevail."

It appears to me that upon this application the court had no jurisdiction to investigate the merits of the claim; and if it had, that it was wholly without the necessary materials and information to form a satisfactory judgment upon it. Whether the claim against Mr. Fernie in respect of this annuity existed at the date of the release, and if it did, whether it was then so cir-

[1] Vide *Kartheus v. Yllas y Ferrer*, 1 Peters, 222. *Lutz v. Linthicum*, 8 Peters, 166. *Wilkinson v. Page*, 1 Hare, 276.

[2] An award may be good in part and bad in part; and if that which is void does not affect the merits of the submission, the residue will be valid. *McBride v. Hagan*, 1 Wend. 326, 340.

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cumstanced as to be affected by it, must depend upon various circumstances of which no satisfactory information is now before the court. All these circumstances the party had a right to bring before the arbitrators, if the release had been set up as a bar to the claim; but the claim and the defence, and the answer to the defence, were excluded by the opinion adopted by the arbitrators, that they were precluded from entering into the question. In this respect also I think the award clearly defective, and therefore void.

Being of this opinion upon these two points, it is unnecessary to discuss the other: but I think the award also defective, and therefore void, on account of the arbitrators having, as they state in their award, altogether abstained from taking the Durham account<sup>(a)</sup> into consideration, and from arbitrating in any way thereupon. They state a reason for their so

[\*164] refusing \*and abstaining which is wholly inapplicable, namely, that

Mr. Fernie had been ordered to pay into court a sum of 2020*l.* 11*s.* 3*d.*, found due by the master; whereas the grievance complained of in respect of such rents, as appears from the agreement of reference, is that these rents not having been credited at the proper time, the balances appeared greater than they would have been if the rents had been properly credited, and the interest charged upon the balance was thereby more than it ought to have been. The reference, therefore, authorizes the arbitrators, if they shall think fit, to correct the account in this respect. It was for them to decide whether that ought to have been done; but they were bound to come to some decision upon it.

This, as I understand, was the opinion of the Vice-Chancellor; but his honor thought that the fair construction of what is stated upon the award was, that the arbitrators had considered the subject, and had decided not to alter the account in this respect. The question, therefore, is simply one of construction of the few expressions used in the award upon this subject; and when I find the arbitrators stating that, for a reason assigned, they had "altogether abstained from taking the Durham account into consideration, and from arbitrating in any way thereupon," I cannot consider those expressions as stating that they had taken the Durham account into consideration, and that they had arbitrated thereupon by deciding that no such credit for interest as claimed should be allowed.

Assuming the true construction of the award to be that the arbitrators have declined to arbitrate upon the two claims of the annuity and of the interest upon the Durham rents, it is clear that the award is bad; and if it were not bad, it is clear that the award would be most unjust in di-  
[\*165] recting general releases, which would for \*ever exclude those two claims which the arbitrators had declined to investigate.

It may be much to be regretted that this reference should have failed; but that cannot affect my decision. Upon the principles of law, fairly admitted

(a) His Lordship uses this expression, as it had been used throughout the argument, to designate the account of the rents of the Durham estate.

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on both sides in the argument, I am of opinion that, upon the statements in the award, it is open to the objections I have observed upon, and I must, therefore, declare it to be void.[3]

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### RICHARDSON v. THE BANK OF ENGLAND.

1838; November 2, 3, 6.

The advances made by one partner to the partnership, and those received by another from it, until the concern has been wound up, only constitute items in the account between the partners, and cannot be treated as debts; and the court, therefore, will not, upon an interlocutory application, order the amount of such advances to be paid in and secured, pending a suit for taking the partnership accounts.

Review of the principles upon which money is ordered to be paid into court in consequence of admissions made in a defendant's answer.

THIS was a suit instituted by the personal representatives of William Esdaile, deceased, one of the partners in the banking house of Sir James Esdaile & Co.; and its principal object was to have a general account taken of all the partnership dealings and transactions, and to have the affairs of the partnership finally wound up and closed.

The bill (which was extremely voluminous) stated the history of the banking house from its establishment in the year 1780, and the various changes which the partnership had undergone down to the month of December, 1833, when it consisted of William Esdaile, who was the senior partner, and of the

[3] Among the matters referred to an arbitrator was the question, whether W. or P. ought to be ultimately liable upon a promissory note, of which P. was the maker, and W. an endorsee, as surety for P; and whether P. was entitled to an indemnity from W. against the liability of P. to pay the note when it became due. The arbitrator, by his award, among other things declared, that the liabilities of P. on the note, as between P. and W. should remain unaffected by the award. It was held that the award was not final, and was therefore bad. *Wilkinson v. Page*, 1 Hare, 276. "That there is a class of cases in the books, in which arbitrators have been held to a more than ordinary strictness in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of the submission being conditional, *ita quod*, is conceded. The case of *Randall v. Randall*, (7 East, 81,) is a leading case of that class. Lord Ellenborough, C. J. in delivering the opinion of the court says: 'The arbitrators had three things submitted to them; one was to determine all actions, &c., between the parties; another was to settle what was to be paid by the defendant for hops, poles and potatoes, in certain lands; the third was to ascertain what rent was paid by the defendant to the plaintiff for certain other lands. The authority given to the arbitrators was conditional, *ita quod*, they should arbitrate upon those matters by a certain day. The arbitrators have stopped short, and have omitted to settle one of the subjects of difference stipulated for.' This case was adjudged according to the rule laid down in the books; that if the submission be conditional, so as the arbitrator decide of and concerning the premises, he must adjudicate upon each matter in dispute, which he has noticed. But the rule is to be understood with this qualification; that in order to impeach an award, made in pursuance of a conditional submission, on the ground of only part of the matters in controversy having been decided, the party must distinctly show, that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them." Trimble, J. *Karthus v. Yllas y Ferrer*, 1 Peters, 227.

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defendants Grenfell, Thomas, and Scott, and that the active management of the concern \*was subsequently left to Grenfell and Thomas, down to the month of October, 1837, when William Esdaile died. The bill alleged that Thomas, on his introduction into the house in the year 1828, brought no capital into it; but that Esdaile, whose daughter Thomas had married, advanced a sum of 20,000*l.* for him, which was entered in the books of the partnership in the joint names of "Esdaile and Thomas." It then stated, that notwithstanding very large advances which were from time to time made to the concern by Esdaile out of his private resources, between the years 1833 and 1836, the house became greatly embarrassed towards the close of the latter year, chiefly through the imprudence of the acting partners Grenfell and Thomas; insomuch that they then found it impossible to continue business without further assistance; and that accordingly they applied to the Bank of England and to certain private bankers in London, and an arrangement was thereupon come to, for winding up the affairs of the house under inspectors; and, on the 17th of January, 1837, conveyances were executed vesting all the freehold, copyhold, and leasehold estates of the partners in trustees, to be applied upon the trusts therein mentioned; and the partners at the same time, executed a deed of inspection, by which certain persons were appointed inspectors, for the purpose of applying the partnership assets in the order and upon the principles therein stated, and generally with a view to wind up and close the affairs of the partnership.

The bill further alleged, that at the time of the execution of these deeds, Esdaile appeared upon the books of the partnership as, and in fact was, a creditor thereon in the sum of 90,816*l.* 18*s.* 4*d.*; and that there was at the same time standing in such books, to the account of "Esdaile and Thomas," a credit in respect of the before mentioned sum of 20,000*l.* so advanced by Esdaile to the partnership, and which, not having been drawn out, [\*167] \*then remained as a debt due to Esdaile; and that the account of Thomas was then overdrawn to the amount of 25,591*l.* 1*s.* 3*d.*, and that Thomas was indebted to the partnership in that sum accordingly, independently of the other liabilities after mentioned.

The bill further stated and set forth in a schedule a certain account and valuation of the partnership assets and of the interest and liabilities of the several partners therein, made out by an accountant, and which was alleged to be correct, and to have been made out upon the principle contended for by the defendants, from which it appeared that, in the month of June, 1837, a sum of 35,844*l.* 18*s.* 10*d.* was due as between the partners, to Esdaile from the partnership; and that the share of Thomas in such deficiency amounted to 31,468*l.* 16*s.* 9*d.* which, together with a small balance of 982*l.* 14*s.* 9*d.* due from him on a profit and loss account, had been carried to his debit, and which, added to the aforesaid sum of 21,591*l.* 1*s.* 3*d.*, the amount of his overdrawn account, left Thomas indebted to the partnership, at the very lowest, in a sum of 54,042*l.* 12*s.* 9*d.*

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In reply to these allegations, and the corresponding interrogatories in the bill, the answer of the defendant Thomas, among other things, stated his belief that at the period of the execution of the deeds, Esdaile appeared on the books of the partnership as a creditor in the sum of 90,816*l.* 18*s.* 4*d.*; and that there was, at the same time, standing in such books to the account of "Esdaile and Thomas" a credit in respect of 20,000*l.* But he denied that that sum constituted an advance to the partnership, and alleged that it was placed by Esdaile to the credit of the defendant as his (the defendant's) capital in the partnership. He admitted, that the same was never drawn out; but he denied that it remained, at the time of the execution of the deeds, as a debt due to Esdaile from \*the partnership. He further [\*168] denied that his account was overdrawn, although he admitted that he had, from time to time, had advances made to him by the house, to the amount of 21,591*l.* 1*s.* 3*d.*, being the sum for which his account was alleged to have been overdrawn; and he denied that, independently of his other liabilities to the partnership, he was indebted thereto in the last mentioned or any other sum; for he said that the balance was in his favor to the amount of 275*l.* 4*s.* 7*d.*, as appeared by the statements contained in the first schedule to his answer, which he prayed might be considered as a part thereof.

The defendant, by his answer, further stated his belief that it appeared by the valuation and account in the bill mentioned, though he did not know whether such valuation was correct or whether it was the fact, that taking such debit to Esdaile against his credit as in the bill mentioned, there was due from the partnership to Esdaile or his estate, down to the month of May, 1837, the sum of 35,844*l.* 18*s.* 10*d.*; and that it appeared by such account, but the correctness of which he did not admit, that the defendant's share in such deficiency as in the bill mentioned amounted to 31,468*l.* 16*s.* 9*d.*, and that that sum was carried to his debit in the said account, and that, together with a small sum of 982*l.* 14*s.* 9*d.*, in the said account stated to be chargeable against the defendant, added to 21,591*l.* 1*s.* 3*d.*, the amount to which it was in the bill stated that the defendant's account was overdrawn, but which amount, in fact, consisted of advances made by the partnership to the defendant, there was, by the said account found due to the partnership by the defendant, down to the month of June, 1837, the sum of 54,042*l.* 12*s.* 9*d.* But he denied that such last mentioned sum was in fact due from him to the partnership, the said account being purely conjectural, and founded on insufficient, and, in some cases, \*erroneous data; and there being, [\*169] in particular, to be deducted from such last mentioned sum, as he contended, the said sum of 20,000*l.* so advanced by Esdaile to the defendant, as the defendant's capital, in the year 1828, when the defendant entered into the partnership.

The defendant, by his answer, further admitted that he claimed the whole interest in the said sum of 20,000*l.* standing to the account of Esdaile and the defendant in the partnership books. But he denied that the same was a sum



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advanced or brought in by Esdaile to the partnership : and he said that he rested his claim to such sum on the fact of its having been advanced by Esdaile as the consideration for the defendant's joining the partnership, and as his (the defendant's) capital therein, and of Esdaile having always, whether in conversation or otherwise, so treated it, and its having been always so considered by the partnership, both in the partnership books and otherwise. He further admitted that no part of the sum was brought into the partnership by the defendant, and that he gave no consideration for the same, except joining the partnership at the request of Esdaile. He denied that, from the commencement down to the dissolution of the partnership, or to any other time, the sum was always treated as an advance by Esdaile to the partnership, or as belonging to Esdaile, save that Esdaile was considered to have a life interest therein : but he admitted that the sum carried interest, and that such interest was regularly paid to Esdaile from the time of the advance during his life, and consequently down to the termination of the partnership.

Upon a motion that the defendant Thomas might pay into court the sum of 21,591*l.* 1*s.* 3*d.*, admitted by his answer to have been advanced to him by the partnership, the Master of the Rolls ordered that he should pay [\*170] into court the sum of 19,724*l.* The order was, with the \*concurrence of the plaintiffs' counsel, restricted to the latter sum, in consequence, as the reporters have been informed, of a doubt expressed by the Master of the Rolls whether the defendant's admission as to the amount for which he had overdrawn his account was not qualified, with respect to certain items, by reference to the schedule annexed to his answer.

The defendant Thomas now moved, before the Lord Chancellor, that this order might be discharged.

Mr. *Wigram* and Mr. *Reynolds*, for the motion.

Mr. *Tinney* and Mr. *Goodeve*, in support of the order.

The defendants, the inspectors, though served, did not appear upon the motion, either in the court below or on the appeal.

The various topics of argument which were addressed to the court upon the motion, and all the authorities which were then cited, are stated and reviewed in the judgment.

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*Nov. 6.*—THE LORD CHANCELLOR :—The points which have been raised in the discussion of this case seemed to me to be of so much importance to the general practice of the court, that I have thought it right to examine all the cases which appear to have any resemblance to the present, before I gave my judgment, although I have not felt any difficulty as to the order which I ought to pronounce.

I must in the first place observe, that the motion for payment into court by the defendant of the sum mentioned in the order must be considered [\*171] as founded upon \*the supposition of that sum being due from him. It is not the case of a contest as to the title to any particular property,



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in which the court will in some cases take possession of the subject matter of the contest for security, until it adjudicates upon the right. Such cases generally arise where the property is in the hands of stakeholders, factors, or trustees, who do not themselves claim any title to it. In ordering money into court under such circumstances, the court does not disturb the possession of any party claiming title, or direct a payment, before the liability to pay is established.

The claim in the present case is for payment of the sum in question, as a debt due, or at least as a sum payable, in order to its being applied to purposes in which the plaintiffs are interested. To support a motion upon these grounds, two things are, I conceive, necessary: first, a clear liability in the defendant to pay; and secondly, an admission by the defendant of the facts from which such liability arises.

I will first consider this case without reference to the deeds, and next inquire how the deeds affect the question.

Without referring to those deeds, the facts are simply these:—that the partnership being at an end, there are, it appears, partnership debts and joint liabilities unpaid: that there was no contract as to advancing capital; but that Mr. Esdaile advanced large sums for the use of the business, and so became, as it is called, a creditor of the firm; and that the defendant Mr. Thomas drew out of the funds of the business, with the consent of the partners, considerable sums, and so became, as it is called, a debtor to the firm.

But though these terms “creditor” and “debtor” are so used, and sufficiently explain what is meant by \*the use of them, nothing can [\*172] be more inconsistent with the known law of partnership than to consider the situation of either party as in any degree resembling the situation of those whose appellation has been so borrowed. The supposed creditor has no means of compelling payment of his debt; and the supposed debtor is liable to no proceedings either at law or in equity—assuming always that no separate security has been taken or given. The supposed creditor’s debt is due from the firm of which he is a partner; and the supposed debtor owes the money to himself in common with his partners; and, pending the partnership, equity will not interfere to set right the balance between the partners. Indeed it could not do so with effect, inasmuch as immediately after a decree has enforced payment of the money supposed to be due, the party paying might, in exercise of his power of a partner, repossess himself of the same sum.

But if, pending the partnership, neither law nor equity will treat such advances as debts, will it be so after the partnership has determined, before any settlement of account, and before the payment of the joint debts or the realization of the partnership estate? Nothing is more settled than that, under such circumstances, what may have been advanced by one partner, or received by another, can only constitute items in the account. There may be losses, the particular partner’s share of which may be more than sufficient

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to exhaust what he has advanced, or profits more than equal to what the other has received; and until the amount of such profit and loss be ascertained by the winding up of the partnership affairs, neither partner has any remedy against, or liability to, the other for payment from one to the other, of what may have been advanced or received.[1] In *Crawshay v.*

[\*173] *Collins*,<sup>(a)</sup> Lord Eldon says, "Where a sum is \*advanced as a loan to an individual partner, his profits are first answerable for that sum; and if his profits shall not be sufficient to answer it, the deficiency shall be made good out of his capital; and if both his profits and his capital are not sufficient to make it good, he is considered as a debtor for the excess." The money drawn out by any partner ceases to be part of the joint stock, so that, upon bankruptcy, the joint creditor cannot recall it, unless there had been a fraudulent abstraction; *Ex parte Yonge*.<sup>(b)</sup> Again, in *Foster v. Donald*,<sup>(c)</sup> Lord Eldon says, "If a partner, as partner, receives money belonging to the firm, and, admitting that he has received it, insists that there is a balance in his favor, there is no pretence for making him pay it in."

It appears to me, therefore, that in the present stage of these partnership affairs, it cannot be considered that the money received by Mr. Thomas out of the partnership funds constitutes a debt which he is at this time liable to pay. But if it could be so considered, and supposing that there is no question of profit, the defendant states positively his title to 20,000*l.* now invested in the partnership business. This sum, it is said, he could not have set off against the money advanced to him, because it stood in the joint names of himself and of William Esdaile; but the question is not what might have been done during the lifetime of William Esdaile, as between himself and William Esdaile, but whether if, as he insists, the 20,000*l.* be now his, he can now be compelled to pay the 20,000*l.*<sup>(d)</sup> which he has borrowed, [\*174] without receiving the 20,009*l.* \*capital. The 20,000*l.* debt would, according to Lord Eldon's doctrine in *Crawshay v. Collins*, be to be paid out of the 20,000*l.* capital, leaving no personal demand against Mr. Thomas.

It is said, then, that the liabilities of Mr. Thomas far exceeded this 20,000*l.* capital, supposing it to be his; for that the debts far exceeding the assets, there will be a large sum, by way of contribution to be paid by him beyond his 20,000*l.* capital. That is not the ground upon which the money has been ordered to be paid in; and if it was, why is the sum advanced to Mr.

(a) 2 Russ. 325; see p. 347; and see also *West v. Skip*, 1 Ves. sen. at p. 242.

(b) 3 Ves. & B. 31.

(c) 1 Jac. & W. 252.

(d) The Lord Chancellor here for convenience, speaks of the amount for which the defendant was alleged to have overdrawn his account as a round sum of 20,000*l.*; but according to the bill it was 21,591*l.* 1*s.* 3*d.*, and according to the order at the Rolls, 19,724*l.* only.

[1] Whether an account between partners will be decreed without a dissolution of the partnership; see *Wallworth v. Holt*, post, 619; 1 Story's Eq. § 671.

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Thomas the sum ordered to be paid in ? The sum upon that ground would be 31,000*l.* and a fraction, the estimated share of Mr. Thomas of the deficiency, independently of his capital or debt ; and if the order were to stand, it is not easy to see how another application for the larger sum could be resisted. It is manifestly impossible, however, to support the order upon that ground. Two parties are jointly liable, and before the extent of such joint liability has been ascertained, can the one, by an interlocutory order, compel the other to pay into court his estimated proportion of the supposed liability ?

There are, indeed, cases in which the court has apparently ordered the payment of a debt upon motion ; such as where an executor or trustee admits himself to owe a debt to the estate he represents. *Rothwell v. Rothwell*, (a) carries it further ; but that decision proceeded upon the particular form of the admission in the answer : and in those cases, the person to pay and the person to receive being the same, the court assumes that what ought to have been done has been done, and orders the payment, not as of a debt by a debtor, but \*as of moneys realized in the hands of the ex- [\*175] ecutor or trustee.

It was ingeniously attempted to assimilate this case to that of an executor who is ordered to pay a balance of assets into court, although, as a legatee, he may be afterwards entitled to receive part of it back. I see no analogy between the two cases. The executor holds the assets as a trustee for creditors who have an interest in the fund, and his claim as legatee is in a subordinate and totally different character. This defendant is not a trustee. The money received by him forms no part of the joint estate, as appears from the case of *Ex parte Yonge* before referred to. To the creditors he is liable only in respect of his general responsibility as a debtor ; and to his partner only as being subject to account. But if the cases were similar, the executor, if he claimed a debt due to him, might release ; and this defendant does claim such debt.

If, however, the practice of the court authorized the ordering a defendant, upon either of these grounds, to pay money into court, the facts to give authority for such an order must be found admitted in the answer. There must, in the one case, be an admission of the sum advanced being due, without there being any capital to meet it, or in the other, of a deficiency of assets to meet the partnership obligations so large as to make the contribution of the defendant equal to the sum required to be paid. Now in this answer I not only do not find any such admission, but, on the contrary, I find a positive denial of some of the material facts, as a substitute for such admission. It is said that the account scheduled to the bill shows such a deficiency, and that the defendant was in some manner party to making out that account, and that he has not, in his answer, stated any error in that account so as materially to affect its \*accuracy. That account is, [\*176]

(a) 2 S. & S. 217 ; and see *Mortlock v. Leather*, 2 Mer. 491.

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upon the face of it, in a great measure, calculation and speculative: but the true answer is, that, for the purpose of paying money into court, evidence cannot be resorted to. The ground must be found in the defendant's admission; and this defendant has not only not admitted the accuracy of the statements in that account, but disputes it in many particulars, and has not admitted that there will be any deficiency to which he will be liable to contribute. I may be perfectly satisfied that there will; I may feel no doubt that he will have to contribute far more than the amount of his capital; but I am not, upon the motion, at liberty to act upon any such conviction or behalf, and it would be most dangerous to do so. Neither party has had any opportunity of giving evidence of any fact. The court, therefore, has nothing upon which it can proceed but the admission of the parties. The defendant justly says, "Take my statement to be true, or give me an opportunity to prove it, before you adjudicate against me:" for, although the order is not an adjudication upon a right, the direction to pay 20,000*l.* into court within a limited time may be quite as injurious.

A reference to some of the cases will show how strongly the court has felt this, and how strictly it has adhered to the rule of acting upon the defendant's admission only. In *Fox v. Mackreth*,<sup>(a)</sup> Lord Thurlow refused to order payment of a balance, the result of charges allowed by the master against the defendant, after allowing all that he claimed in discharge. In *Mills v. Hanson*,<sup>(b)</sup> Lord Eldon refused to order payment into court of a sum verified by affidavits to be the result of the defendant's answer and of partnership books brought into the master's office by the defendant, unless [\*177] where the defendant had so referred in his \*examination to the books as to make them as much part of it as the schedule to it. In Maddock's Chancery Practice<sup>(c)</sup> a case of ——— *v. Bailey*,<sup>(d)</sup> is mentioned, in which the court declined to act upon a stated account, the answer denying its correctness. In *Quarrell v. Beckford*,<sup>(e)</sup> Lord Eldon refused to order a mortgagee in possession to pay into court the balance appearing on the schedule to his answer, the answer saying that the defendant did not know whether any thing was due to him, or what was the amount of repairs and improvements. In *Wood v. Downes*,<sup>(g)</sup> there had been a decree for an account of principal and interest; the defendant, an executor, upon his examination admitted the principal moneys, which were ordered to be paid into court; but the Lord Chancellor declined to order the interest to be so paid upon an affidavit of the amount. In many of these cases there was no doubt of the money being due; but the court refused to act upon its knowledge of that fact derived from any other source than the defendant's admission. In this case that source of information is altogether wanting.

(a) 1 Ves. jun. 69.

(b) 8 Ves. 68, and 91.

(c) Vol. ii. p. 400, 2d ed.

(d) 30th July, 1805.

(e) 14 Ves. 177.

(g) 1 V. & B. 49; and see *Creak v. Capell*, 6 Mad. 114, *Donville v. Solly*, 2 Russ. 372.

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I have entered into this part of the case, because it appeared to me expedient, from the course which the argument has taken, to review some of the rules upon which the court acts in motions for payment of money into court; although there are in the case facts which are, to my mind, quite sufficient to decide it without referring to such rules.[1]

By the deeds, which I must take to be the acts of all the parties to them, it appears that the partnership being in difficulties, though not supposed to be "insolvent, the Bank of England and certain private bank- [\*178]ers agreed to advance money sufficient to pay all the debts owing by the partnership, upon the partnership effects and various properties belonging to the several partners being put in trust to secure the repayment of the moneys so to be advanced, which advances were also secured by judgments at the suit of the bank, against the several partners. Mr. Thomas, the defendant, conveyed certain estates to the trustees for these purposes; and it was known to all the parties, at the time, that the advances had been made to him out of the partnership funds. The deeds provide for the payment of all the advances by the bank and the private bankers, and give to the inspectors large powers for that purpose. The continuance of these liabilities for repayment of the moneys advanced, and of some of the joint debts remaining unpaid, constitutes the ground of the order under appeal. But the deeds provide for the discharge of these liabilities, and the payment of these debts, in a different manner, if the sum so advanced to the defendant does not form part of the trust fund; and it would be a breach of all good faith to permit Mr. Thomas to devote other parts of his property to the payment of these advances and debts, not expecting to be called upon for payment of the money so received by him, and then to call upon him to pay that money, when, by so devoting other property to the purposes of the trust, he may have deprived himself of the means of raising it.

That the inspectors did not oppose the order does not, I think, afford any

[1] Vide *Collis v. Collis*, 2 Sim. 365. An order on motion, for payment into court by a trustee of trust funds, admitted to have been sold out under a power of attorney executed by him was refused, on the ground that there was not a sufficient admission of the misapplication, and the trustees being authorized to vary the investments. *Meyer v. Montriau*, 4 Beav. 343. In a suit against trustees for a breach of trust, one of them admitted that the funds had been sold out, by means of a power of attorney executed by him for the purpose, as he stated, of investing it on more advantageous securities; he stated that he was not concerned in the receipt of the produce, but he had been informed that it had been received by his co-trustee, or by J. M. by his permission. The settlement contained a power to vary the investments. It was held, that there was not, on the answer, a sufficient admission to justify an interlocutory order on this trustee for payment of the money into court. Ibid. The subject of litigation was a fund in the hands of the assignee of an insolvent. The assignee in his answer admitted the assignment, and that he had no interest therein except as trustee; that he had sold the goods assigned, and had in his hands, as the net amount of the proceeds of sale, a certain sum which he held for the sole use of the creditors named in the assignment. The assignee had himself become insolvent. The money was ordered to be brought into court. *Haggerty v. Duane*, 1 Paige, 321. In this case, however, the principal question discussed in the text was not even alluded to.



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grounds to support it. They are mere trustees, and have no interest in the question; and in a contest between *cestuis que trusts* it is not only not the duty of trustees to take part with either side, but it is proper that they should abstain from doing so. The defendant has an interest in con- [\*179] tending that the \*execution of the trust ought to be left to them, whether they wish to execute it or not; and he has a right to the judgment of the court upon that question.

It may be, that justice has not been done to the estate of Mr. Esdaile; but I cannot in this suit enter into that question. I can only consider the motion with reference to what I conceive to be the practice of the court; and my opinion is, that, consistently with that practice, the order made cannot be supported.

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 NICHOLSON v. HOOPER.

1838: Feb. 28; March, 3; Aug. 27.

A., the owner of certain chattels, pledged them to B., who was a broker, to secure advances made on his behalf by B.; and B. afterwards, in his own name, and unknown to A., re-pledged the same chattels to C., to secure advances made by C. to B., but of which, unknown to C., A. was to have the benefit. C. having subsequently applied in vain to B. for payment of his advances, threatened to realize his security by a sale, which, however, he was from time to time induced to postpone, by the solicitations of B., and his assurances of speedy payment: and this was communicated by B. to A., his principal. In a suit by A. against B. and C., praying to redeem the property in pledge on payment of any balance found due on the account between himself and B., it was held that A. had no equity to restrain C. from proceeding to an immediate sale.

A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be in equity permitted to assert his own title against a title created by that other, although he derives no benefit from the transaction.

Whether, under the circumstances, C. could make a good title to a purchaser? *Quære.*

THIS was an appeal motion, on behalf of the defendants Messrs. Hichens & Co., that an injunction which the Vice-Chancellor had granted upon the answers and affidavits, and by which Hichens & Co. were restrained from proceeding to sell or dispose of certain tea warrants then in their hands, might be dissolved.

It appeared from the plaintiff's affidavit, that at the East India Company's sales, according to the custom of the tea trade, a warrant is made out [\*180] for each lot of tea \*sold, upon which a certain deposit is paid to the East India Company; that the remainder of the price, called the prompt, is to be afterwards paid at the time appointed by the company; that the warrant is made out in the name of the broker by whom the purchase is made, and who indorses the warrant; that between the payment of the deposit and the payment of the prompt, such warrants are frequently put into circulation and made the subject of sale and purchase; and that the purcha-



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sers of such warrants become entitled to the teas therein-mentioned on payment of the prompt due in respect of such teas.

The teas, to which the warrants in question in the cause related, were purchased for the plaintiff, a tea dealer, by the defendant Hooper, who was a tea broker, and also a sworn broker of the city of London; and Hooper, having paid or undertaken to pay to the East India Company, on the plaintiff's behalf, the prompt due upon the teas comprised in the warrants, was allowed by the plaintiff to hold the warrants as a security for the repayment of the sums which he had advanced or should advance for that purpose; and Hooper, shortly afterwards having himself occasion to borrow money to enable him to make that payment, delivered the same warrants, without the knowledge or privity of the plaintiff, to Hichens & Co. as a security for a sum of 48,000*l.*, which they then advanced to him for that purpose.

The particular circumstances and subsequent history of the transactions between the parties, are sufficiently stated in the Lord Chancellor's judgment.

Besides the general grounds of argument which were taken upon the motion, and which arose out of the dealings between the parties, as affecting the equity asserted by the plaintiff, two other questions were raised and discussed at considerable length; first, how far a \*person [\*181] standing in the relation of factor or agent to another, and especially a sworn broker of the city of London, could, either upon general principles, or under the provisions of the 6 G. 4, c. 94, commonly called the factors' act, be permitted, at law or in equity, to create an effectual charge, by way of pledge, upon property belonging to his employer; the character and position of Hooper, the intermediate holder, being, it was contended, sufficient to put Hichens & Co. upon inquiry, and therefore giving them constructive notice that the warrants which he had offered them in pledge were not his own: and, secondly, supposing all objection upon that ground to be got rid of, and the deposit with Hichens & Co. to amount to a valid pledge, whether they thereby acquired such a title to the property as would enable them to sell again, and make a legal title to a purchaser.

Upon the first point, *Ex parte Dyster in the matter of Moline*,(a) as to the obligations of a London broker, and the statute 6 Geo. 4, c. 94, together with the following authorities, were cited and commented upon;—*Baring v. Corrie*,(b) *Barton v. Williams*,(c) *Robertson v. Kensington*,(d) *Haynes v. Foster*,(e) *Whitebread v. Jordan*.(g)

Upon the second point reference was made to the pawnbrokers' act, 30 Geo. 2, c. 24, s. 10, and also to Paley's Principal and Agent,(h) *Langfort v. Administratrix of Tyler*,(i) *Tucker v. Wilson*,(k) *Lockwood v. Ewer*,(l)

(a) 1 Mer. 155

(b) 2 B. &amp; Ald. 137.

(c) 5 B. &amp; Ald. 395.

(d) 5 Mann. &amp; Ry. 381.

(e) 4 Tyrw. 65.

(g) 1 Y. &amp; Coll. 303.

(h) 3d ed. by Lloyd, pp. 15, 16.

(i) Salk. 113.

(k) 1 P. Wms. 261.

(l) 2 Atk. 303, 9 Mod. 275.

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[\*182] *Kemp v. Westbrook*,<sup>(a)</sup> *Pothonier v. Dawson*,<sup>(b)</sup> \**Kemp v. Pryor*,<sup>(c)</sup> *Maclean v. Dunn*,<sup>(d)</sup> *Clay v. Harrison*,<sup>(e)</sup> Story on Bailments,<sup>(g)</sup> *Curling v. Shuttleworth*,<sup>(h)</sup> *Walter v. Smith*,<sup>(i)</sup> *Evans v. Trueman*,<sup>(k)</sup> Bacon's Abridgment,<sup>(l)</sup> and Comyn's Digest.<sup>(m)</sup>

From the view, however, which the Lord Chancellor took of the effect of the dealings between the parties to the suit it will be seen that it became unnecessary for his Lordship to decide either of these questions.

Mr. *Wigram* and Mr. *Richards*, for the motion.

Mr. *Knight Bruce* and Mr. *Calvert*, contra.

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Aug. 27.—THE LORD CHANCELLOR.<sup>(n)</sup>—The original bill in this case states advances of money made to the plaintiff by the defendant Hooper, for which certain tea warrants are taken as security ; that the warrants are made payable to the broker ; that they are indorsed by him, and are put into circulation, and that the holder is entitled to the tea on payment of the prompt ; that Hooper, after he paid of the prompt for the plaintiff, held the warrants as a security for his advances.

The original bill was filed in the month of February, 1837. It states the deposit of the warrants by Hooper with Hichens & Co. ; it does not pray any account or injunction against their selling the same, but only an in-  
[\*183] junction against an action at law ; and it offers to pay \*the balance if any, which may be found due from the plaintiff to the defendants, or any of them, upon taking the account between the plaintiff and Hooper, that is to say, upon taking "the account aforesaid," which is the account prayed as between the plaintiff and Hooper. The supplemental bill, which was filed in January, 1838, charges that Hichens & Co. knew that Hooper was not the owner of the warrants, and prays for an injunction against Hichens & Co. to restrain them from selling or disposing of the warrants.

These two bills, therefore, treat Hichens & Co. as mere holders of the warrants, and as liable to any decree to which the plaintiff might be entitled as against Hooper, but the suit, as against them, seeks no redemption of any charge to which they may be entitled.

In answer to these bills, the defendants Hichens & Co. in substance state, that Hooper was possessed of these warrants ; that they knew nothing of the plaintiff's title to them ; and that Hooper deposited them with the defendants, as a security for a sum of 48,000*l.* advanced by the defendants to him to pay the prompt : that this transaction took place in the month of February, 1835 : that on the 4th of May, 1835, they wrote a letter to Hooper, requiring

(a) 1 Ves. sen. 278, and the decree in Mr. Belt's Supplement.

(c) 7 Ves. 237.

(d) 4 Bing. 722 ; 1 Moore & P. 761.

(g) P. 208, s. 310.

(h) 6 Bing. 121.

(k) Cited in Paley's Principal and Agent by Lloyd, p. 227.

(m) Tit. Mortgage (A.)

(n) This judgment was delivered by the Lord Chancellor at his house during the long vacation.

(b) Holt's N. P. C. 385.

(e) 10 Barn. & Cress. 99.

(i) 5 B. & Ald. 439.

(l) Tit. Bailment (B.)

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payment by the 16th of June, of the whole of their advance; and that on the 2d of June, they again wrote a letter to him, giving him notice that if repayment was not made on or before the 16th of June, they should proceed to sell the warrants: that on the 3d of June, Hooper sent these two letters to the plaintiff, stating, not as a matter of information, but as a fact, that the defendants were the persons of whom, on the 27th of February preceding, he had borrowed the 48,000*l.* for the plaintiff, upon the security of the warrants, and requesting his instructions: that on the 28th of May, 1836, they (Hichens & Co.) wrote another letter to \*Hooper, [\*184] stating that they had not acted on their former letter, in consequence of his repeated applications to them to abstain therefrom, but giving him notice that, unless the balance was paid on or before the 10th of June then next, they should proceed to sell the securities: that this letter also was sent by Hooper to the plaintiff: that, on the 18th of June, 1836, they again wrote to Hooper, saying that they acceded to his request of abstaining from selling for one month, but that, if the balance was not paid by the 17th of July, they should proceed to sell, and held him liable for any deficiency: that this letter was also sent by Hooper to the plaintiff, together with a letter from himself dated the 20th of June, 1836, in which he stated that, on their previous assurance that another month would enable them (that is, the plaintiff and himself, Hooper) to take up the tea warrants and other securities lodged in the defendants' hands, and to pay the balance advanced, he had prevailed upon the defendants to wait that time; but that if he (the plaintiff) did not furnish him (Hooper) with money to discharge the defendants' account, or discharge it himself, by the period mentioned, he must be answerable and liable for all the consequences: that, on the 13th of August, 1836, Hooper again wrote to the plaintiff, informing him that the defendants had announced their determination to proceed to an immediate sale of the securities, unless they had some satisfactory proposition made to them for a settlement by the then next Monday.

The plaintiff, in his bill, states that he had only recently discovered the transaction between Hooper and the defendants; but the correspondence proves that, if he did not know it at the time, he was informed of it about three months after it took place. The defendants deny that they were, at the time of the advances, or until above nine months afterwards, aware that Hooper was acting for any other person.

The letters, independently of any allegation of fact contained in [\*185] the answers, establish, first, that in June, 1835, the plaintiff knew that the loan, of which he had had the benefit, had been advanced by the defendants to Hooper upon the security of the tea warrants, and that the defendants claimed the right of selling the warrants in repayment of their advances; and, secondly, that to induce the defendants to abstain from selling the warrants, the plaintiff permitted Hooper, from time to time to promise

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payment, without raising any question as to the defendants' asserted title to sell them ; and that the defendants, from time to time, acquiesced in these applications for time, of which the plaintiff had the benefit, by preserving the warrants, and avoiding the sale of the tea at the then low price. If the plaintiff had raised any question as to the defendants' right to sell the warrants, they would naturally have called upon Hooper for payment, which would have compelled him to call for payment from the plaintiff. So long as the plaintiff could derive any benefit from the defendants' confidence in their title to sell the warrants, he permits them to trust to it ; but when that advantage can no longer be obtained, he disputes their title from the beginning, and calls upon this court to assist him in defeating their claim.

Such assistance this court ought not, in my opinion, to afford ; and in my view of the case it is not necessary to enter into the question whether Hooper had, or had not, a right to deposit these warrants, and to give the defendants a good title to sell them for the re-payment of the money advanced by them. If Hooper had no such right, it was the duty of the plaintiff, when informed of his having assumed it, and that the defendants had, on the faith of it, advanced a large sum of money, to have apprised them of his intention to dispute it. Not only did he not do so, however, but through Hooper, as his agent, he confirmed them in the error into which they are supposed to have fallen, and himself derived benefit from the delusion so perpetuated : *Sugden's Law of Vendors and Purchasers*. (a) A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person although he derives no benefit from the transaction.[1]

Whether, if the defendants had required the aid of a court of equity in order to give effect to the title which they have so acquired, the court would have given them such assistance, is a question which it is not necessary now to consider, as I have only to decide whether the plaintiff is entitled to the assistance of a court of equity to defeat it.

It may be supposed that the injunction ought to be continued on payment into court of the balances claimed by the defendants. That would have been matter for consideration, if the bills had affirmed the title of the defendants

(a) Vol. ii. p. 262, 9th ed.

[1] Vide *Pickering v. Pickering*, post, 289, 804. *Greenhalgh v. The Manchester and Birmingham Railway Co.* 3 Myl. & Cr. 785, 795, and note 1, *ibid.* *Skinner v. Dayton*, 19 Johns. Rep. 561. *Watson's Ex'rs v. McLaren*, 19 Wend. 563. *Williams v. The Earl of Jersey*, Cr. & Ph. 91. *Haight v. The Proprietors of the Morris Aqueduct*, 4 Wash. C. C. Rep. 608. *Wyeth v. Stone*, 1 Story's Rep. 283. *Prendergast v. Turton*, 1 Yo. & Coll. C. C. 98. *Bowser v. Colby*, 1 Hare, 139. To give acquiescence the effect of depriving a party of a right or title, it must appear that he had full knowledge of all the facts of the case, and of the legal consequences resulting from those facts. 3 Russ. 574, n. 1. *Cockerell v. Cholmeley*, 1 Russ. & M. 418. S. C. 3 Russ. 565 ; Taml. 435. *Flagg v. Mann*, 2 Sumn. 563. *Munch v. Cockerell*, 9 Sim. 339. *Fish v. Miller*, 1 Hoff. Ch. Rep. 267.

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to the security of these warrants and offered to redeem them; but these bills dispute that title altogether, and decline entering into any of the transactions between Hooper and the defendants, Messrs. Hichens & Co.

Being of opinion, under the circumstances stated in the answers, that the plaintiff cannot be permitted in a court of equity, to question these transactions, I must refuse the injunction prayed, and discharge the order by which it was granted; without, however, giving an opinion as to any legal rights of the parties, or as to any question which may arise between them in this court in any other form.

\*HOLE v. ESCOTT.

[\*187]

1838: June 5, 9; November 24.

A husband upon marriage, settled an estate to the use of himself for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of trustees for a term of years, to secure a jointure for the wife, with remainder to the use of such children of the marriage as the husband and wife jointly, or, in default of a joint appointment, the survivor of them should appoint, with remainder, in default of such appointment, to the children of the marriage equally, with remainder to the right heirs of the husband. The husband became bankrupt and after his bankruptcy, he and his wife made a joint appointment in favor of two of the children of the marriage. The husband then died, and a bill having been subsequently filed by a person claiming under the bankruptcy, for an account of the rents of the settled estate, the wife thereupon executed a separate appointment in favor of the same children, which she stated in her answer.

Held, first, that the joint appointment was inoperative, on the ground that the husband could not by a subsequent execution of the power, deprive his assignees of an estate which had been once vested in them by his bankruptcy; secondly, (by implication,) that such joint appointment could not be considered as the separate appointment of the wife, who survived; and, thirdly, that the wife's separate appointment after the husband's death was a good exercise of the power; and that the account of the rents prayed by the bill could not be extended beyond the date of that appointment.

THE material facts and the several instruments upon which the questions in this cause arose are fully stated in Mr. Keen's report of the case upon the hearing at the Rolls.(a)

The Master of the Rolls having decided that the joint appointment by the husband and wife and the separate appointment by the wife surviving were both ineffectual, and made a decree for a general account of the rents and profits of the estates comprised in the appointments, the two children of the marriage who claimed under the appointments appealed against the whole decree.

Mr. *Wigram*, and Mr. *West*, for the plaintiffs, and Mr. *Chandless*, for a defendant in the same interest, in support of the decree, contended that the joint power was either totally extinguished by the bankruptcy, or, if not, that at all events, the husband could not be permitted to derogate from his own

(a) 2 Keen, 444.



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act, so as, by any subsequent exercise of the power, to take from his [\*188] assignees \*property which had been once vested in them by the operation of the bankrupt laws. On this point they referred to and relied upon *Badham v. Mee*,(a) and Sir E. Sugden's remarks upon that case,(b) together with the several bankrupt acts, 34 & 35 Hen. 8, c. 4, s. 1, 13 Eliz. c. 7, s. 2, and 21 James 1, c. 19, s. 9; and they also referred to the following cases:—*Albany's case*,(c) *King v. Melling*,(d) *Higden v. Williamson*,(e) *Edwards v. Sleater*,(g) *Jewson v. Moulson*,(h) *Smith v. Death*,(i) *Horner v. Swann*,(k) *West v. Berney*,(l) *Bickley v. Guest*,(m) *Doe v. Britain*.(n)

They further insisted that the joint appointment by the husband and wife, made after the bankruptcy, could not, upon any sound principles of construction, be held to operate as a good appointment by the survivor, the wife not having at that time acquired the character of survivor; *MacAdam v. Logan*.(o)

Lastly, they submitted that the separate appointment by the wife, executed after the husband's death, and after the filing of the bill, was ineffectual, on the ground that the power itself had failed, upon the husband's decease, for want of an estate of freehold to support it. They argued, that wherever a limitation could be construed to take effect by way of remainder, it should never be allowed to operate as an executory devise or springing use; *Fearne on Contingent Remainders*,(p) *Doe v. Morgan*.(q)

[\*189] \*Sir W. Follett and Mr. Richards, in support of the appeal, made two points, and contended, first, that the joint power was not affected by the bankruptcy of the husband, but that the appointment by him and his wife, though posterior to that event, was a good execution of the power; and secondly, if not that the appointment by the wife after the bankrupt's death, and after the filing of the bill, was at all events, a good execution of the separate power given to the survivor. With respect to the first point, in addition to the cases referred to on behalf of the plaintiffs, they cited and commented upon the following authorities;—*Ben v. Bulkeley*,(r) *Tyrrell v. Marsh*,(s) *Thorpe v. Goodall*,(t) *Long v. Rankin*,(u) *Jones v. Winwood*,(v) *Sanders on Uses*.(w) Upon the second point, they referred to *Purefoy v. Rogers*,(x) *Duke of Marlborough v. Godolphin*,(y) *Doe v. Martin*,(z) *Fearne on Con-*

(a) 1 Mylne &amp; Keen, 32; and 7 Bing. 695.

(b) Sugd. on Powers, vol. i. p. 80, 6th ed.

(c) 1 Rep. 107.

(d) Vent. 214, 225.

(e) 3 P. Wms. 132.

(g) Hard. 410.

(h) 2 Atk. 421.

(i) 5 Mad. 371.

(k) T. &amp; Russ. 430.

(l) 1 Russ. &amp; Mylne, 431.

(m) 1 Russ. &amp; Mylne, 440.

(n) 2 B. &amp; Ald. 93.

(o) 3 Bro. C. C. 310.

(p) Page 381.

(q) 3 T. R. 763.

(r) Doug. 292.

(s) 3 Bing. 31.

(t) 1 Rose 40; and 17 Ves. 288.

(u) Sugd. Powers, vol. ii. p. 539, 6th ed. App.

(v) In the Court of Exchequer; now reported, 3 Mees. &amp; Wels. 653.

(w) Vol i. p. 169.

(x) 2 Saund. 380, and the note by Serjt. Williams.

(z) 2 Ves. sen. 61.

(y) 4 T. R. 39.



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 1838.—Hole v. Escott.
 

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tingent Remainders,(a) Sir E. Sugden's note to Gilbert on Uses,(b) and Sugden on Powers.(c)

**Nov. 24.—THE LORD CHANCELLOR:—**The facts of this case are fully stated in the second volume of Mr. Keen's Reports.(d) It is not necessary, therefore, for me to re-state them.

The objections made to the two appointments upon which the title of the children rested are totally distinct.

\*1. To the joint appointment by the father and mother, after the [\*190] father's bankruptcy, two objections were made; first, that the power was extinguished by the bankruptcy; secondly, that if not extinguished, no title could be obtained under the execution of it, inasmuch as the bankrupt could not be permitted to destroy the title of his assignees.

Upon the first point, I do not propose to express any opinion. It is not necessary that I should do so, for the purpose of the judgment which I propose to pronounce; and considering the doubt that exists as to the grounds of the opinion of the Court of Common Pleas in the case of *Badham v. Mee*,(e) I think it inexpedient and unnecessary to discuss the question.

Supposing, then, that the bankruptcy of the father and the proceedings thereupon did not extinguish the power, could the father, after his bankruptcy, execute the power, and thereby take from his assignees the fee of the property, for the purpose of bestowing it upon his children?

At the date of the bankruptcy he had an estate for life, with,—as the event turned out,—an immediate remainder to himself in fee, subject to a rent charge of 50*l.* for his wife surviving, and a term to secure it; the estate limited to the children in default of appointment failing, as it is admitted, for want of a particular estate to support it. He had indeed a power with his wife's concurrence, of defeating this remainder in fee by appointing estates to his children; but that power, I will assume, had not been executed.

\*The statute 13 Eliz. c. 7, s. 2, enables the commissioners to dis- [\*191] pose of any estate, for such use, right, or title as the bankrupt shall have in the same, which he may lawfully depart withal; and the statute 21 James I. c. 19, s. 1, directs that the bankrupt laws shall be expounded most favorably for the relief of creditors. Now, up to the time of the bankruptcy, the bankrupt might, undoubtedly, have departed with his life estate and his remainder in fee; and if he had done so, in terms, could he afterwards have executed the power so as to take away the fee for the purpose of giving it to the children? I apprehend not. It was entirely optional in him whether the children should, or should not, have any interest in the estate. There

(a) P. 228.

(b) P. 153.

(c) Vol. ii. p. 252., 6th ed.

(d) 2 Keen, 444.

(e) 7 Bing. 695. [The decision in this case may be considered as overruled. *Jones v. Wison*, 10 Sim. 150]

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was no right in them—no equity entitling them to call upon the father to execute the power in their favor. The appointment, therefore, would have been a voluntarily act by the grantor defeating his own grant. He might have parted with his life estate and his fee; and the statute takes from him and vests in his assignees all that he might have departed with.

In *Badham v. Mee*, as reported in the 1st volume of Mylne & Keen's Reports,<sup>(a)</sup> it was not contended that the appointment could prevail so as to interfere with the bankrupt's ultimate reversion, or beyond that interest which would have belonged to the children in default of appointment. Sir Edward Sugden, in his observations upon *Badham v. Mee*,<sup>(b)</sup> also assumes, as I understand the passage, that the appointment would be void as against the assignees. If, then, the estate for life and the fee, unaffected by any execution of the power, passed to the assignees, the bankrupt could not, by a [\*192] subsequent execution of the power, deprive them of it; *Doe v. Britain*.<sup>(c)</sup> The joint appointment of the father and mother was, therefore, inoperative to confer any estate upon the children.

2. The appointment by the mother, who had survived the father, seems to be objected to upon the ground that, by the death of the father, living the mother, the limitation to the children living at the death of the survivor had failed, and that the estates attempted to be created by the appointment of the mother must also fail. For this purpose the rule is referred to, that if limitations can take effect as contingent remainders, they shall not take effect by way of springing use. But this reasoning assumes that the limitations created by the mother's appointment are to be subject to the same rules as those made directly to the children. The latter are to take effect only in default of appointment, either by the two parents, or by the survivor; and I have not heard any sufficient reason to show that the estates created under the prior powers of appointment are affected by that infirmity which has defeated the ultimate limitation. Be it that the estates limited to the children cannot take effect; how is that to effect the estates created by the mother's appointment, which originated in her act after the father's death, and could never have taken effect as remainders? These remainders having failed by the death of the father in the lifetime of the mother, the fee vested in the heir of the father, the settlor; and why should not such fee be divested by the appointment of the mother, and thereby effectually given to the appointees? Suppose there had not been in the settlement any such limitation to the children in default of appointment, the state of the property would have been precisely the same.

[\*193] \*It was argued that the estates limited by the execution of the power are to be considered as if they had been created by the deed creating the power.[1] For some purposes this is true; but the rule was referred

<sup>(a)</sup> P. 44.<sup>(b)</sup> Treat. on Powers, vol. i. p. 80, 6th ed.<sup>(c)</sup> 2 Barn. & Ald. 93.

[1] Vide *Skeels v. Shearly*, 3 Myl. & Cr. 112, 120. *Tunstall v. Trappes*, 3 Sim. 300. *Barnes v. Raester*, 1 Yo. & Coll C.C. 410.

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1838.—Curtis v. Lloyd.

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to for the purpose of building upon it this argument, that limitations, which may possibly take effect as remainders, shall not be considered as springing uses, and, that if considered as remainders, they would have failed by the death of the father in the lifetime of the mother. No authority, however, has been produced to show that this rule applies to such cases as the present, which would, in effect, be to subject to the same rule a contingency depending upon future events, and the result of a discretion to be exercised at a future time.

Being unable, therefore, to find any principle or any authority for considering the appointment by the surviving mother as void, and finding it clearly provided by the settlement that, in default of any joint appointment by the father and mother, the power should be exercised by the survivor, I cannot concur in that part of the judgment of the Master of the Rolls which considers such appointment as inoperative.

Being of opinion that the assignees are entitled, as against the appointment of the bankrupt, but that the appointment of the wife surviving is good against them, the decree, upon this bill, must be confined to an account up to the time at which the title accrued under the appointment of the wife, with a declaration that such separate appointment is good.[2]

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\*CURTIS v. LLOYD.

[\*194]

1838: November, 25, 26; December, 8.

A plaintiff may obtain the common order dismissing the bill with costs, at any time before the cause has been actually heard; and even after it has been called on for hearing.

WHEN this cause was called on before the Lord Chancellor for hearing, Mr. *Wakefield*, of counsel for the plaintiff, stated that it had come on rather unexpectedly, in consequence of several other causes, which stood before it in the list, having been struck out of the paper; and he requested that it might stand over until the next day, adding that, from what he privately knew of the case, although he had not received instructions on the subject, he thought it not unlikely that, if this course were taken, the court might eventually be spared the trouble of hearing it at all. The cause was directed to stand over accordingly.

On the following day, the cause of *Curtis v. Lloyd*, having been again called on, Mr. *Wakefield* stated that the plaintiff had, that morning, obtained, as of course, an order dismissing his bill with costs, so that the suit was no longer in court.

The *Solicitor General* and Mr. *Wigram* submitted that it was not competent for a plaintiff, after his cause was in the paper for hearing, still less after it had been actually called on, and had only been allowed to stand over

[2] As to extinguishment of a power of appointment, see further, *West v. Berney*, 1 Russ. & M. 431; *Bickley v. Guest*, id. 440.

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 1838.—*Curtis v. Lloyd*.
 

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at the request and for the accommodation of his counsel, to obtain, behind the back of his adversary, a common order, dismissing his bill. Such an order was irregular, and ought to be treated as a nullity.

Mr. *Wakefield, contra*, insisted that, in accordance with the practice, a plaintiff might, at any time before decree, and, at all events, up to [\*195] and at the time when his cause was called on for hearing, obtain the common order dismissing his bill with costs. The same objection had been taken by Mr. Bell in a case of *Locke v. Nash*,<sup>(a)</sup> before Sir William Grant, in which he, (Mr. *Wakefield*,) being of counsel for the plaintiff, on the cause being called on, got up, and handed in a motion paper to the Registrar, that the bill might be dismissed. On that occasion Sir W. Grant, after causing the practice to be inquired into, came to the conclusion that the course taken by the plaintiff was regular.

The Lord Chancellor desired the matter to be spoken to again during the sittings after term, and observed that he should consider the question as it would have stood on the day when the cause was, at the request of Mr. *Wakefield*, directed to stand over.

*Dec. 8.*—The *Solicitor General*, in support of the objection.—In general, if a plaintiff obtains an order dismissing a bill, he may immediately file a new bill having the same object; but after he has put the court in possession of his case by proceeding to a hearing, that course is no longer open to him. In this view, a cause is to be considered as being heard and disposed of the moment it is called on; and it follows that, in the present case, the order for dismissing the plaintiff's bill, having been made the day after the cause was first called on, is a mere nullity, or, at all events, is irregular, and must be discharged; for the court will never sanction such an order if the defendant would be thereby prejudiced. *Booth v. Leycester*.<sup>(b)</sup> Here [\*196] the plaintiff is desirous to retain the power of renewing his claim at some future time; whereas, if a decree is now made against him, as he apprehends it must be, on the merits, it will be pleadable in bar of any future demand in respect of the same subject matter.

Mr. *Wakefield, contra.*—*Locke v. Nash* is an express authority against the objection now taken. Until the defendant has acquired a right by a decree actually pronounced, the plaintiff is always at liberty to dismiss his bill upon paying the costs. The rule is so laid down in *Carrington v. Holly*,<sup>(c)</sup> where Lord Hardwicke went a step further, and held that even after a decree directing an issue, the plaintiff might still move to dismiss his bill, for until the issue had been tried there was no determination; *White v. Lord Westmeath*.<sup>(d)</sup> The reasons of the Master of the Rolls, in *Booth v. Leycester*, are not satisfactory; but the case was one of very peculiar circumstances, and

(a) 2 Mad. Ch. Prac. 389; 1 Turn. & Ven. Prac. 613.

(b) 1 Keen, 247.

(c) 1 Dick. 280.

(d) 1 Beatt. 174.

1838.—Willis v. Hiscox.

it has no application here. In the case of an action at law, the plaintiff may have leave to enter a nonsuit at any moment before verdict given. Why should this plaintiff be worse off because his counsel appears and says he means to abandon the case, than if he had not appeared at all, when the only decree that could have been made against him, would be a decree on his default, dismissing his bill with costs?

THE LORD CHANCELLOR :—I was not aware that the doctrine had been carried to the extent to which Lord Hardwicke seems to carry it in *Carrington v. Holly* : but I cannot see why a plaintiff should be in a worse situation, because he informs the court that he does not intend to proceed with the hearing of his cause, than if he made default. In principle it is substantially the same thing.[1]

## \*WILLIS v. HISCOX.

[\*197].

1838 : November 16. 1839 : January 16.

Devise of real estate to trustees upon trust for the testator's son W. for life, and after his decease, to the heir male of his body begotten of an European woman, and the heirs of such heir male; and in case his son should die without leaving such heir male of his body, the trustees to pay the rents equally between the testator's daughters, M. and A., for their lives, and the whole to the survivor; and after the decease of the survivor, upon trust for the heir male of the body of M. and the heirs of such heir male, and in default of such heir male of her body, upon trust for the heir male of the body of A. and the heirs of such heir male. W. and M. both died without issue, and A., having a son, suffered a recovery of the devised estate, and resettled it to new uses, under which a remote interest was limited to the surviving trustee, and died leaving her son surviving, who thereupon filed his bill against the surviving trustee of the will for a conveyance of the legal estate.

Decree made against the trustee with costs : the court holding clearly that, under the devise, A. took a life estate only, with remainder to her son in fee.

THE bill stated that William Child, by his will, duly executed and attested, devised his freehold estate and premises, situate at Stainton Dale, to four persons, and the survivor of them, and the heirs of such survivor, upon trust to pay the rents thereof unto his daughter, Mary Child, or her assigns, during her life, provided she continued unmarried; and from and after her decease or marriage, which should first happen, upon trust for his son, William Gilbert Child, or his assigns, during his life; and after his decease, to the heir male of his body, begotten or to be begotten of an *European* woman, but not of a black or mulatto, and the heirs, executors, and assigns of such heirs male of his said son; and in case his said son should die without leaving such heir male of his body (his daughter, Mary Child, being either dead or married at that time), then upon trust that his said trustees should pay the rents of his said freehold estates to his daughters, the said Mary Child and

[1] Vide 1 Keen, 255, n. 2.

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1838.—Willis v. Hiscox.

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Ann Willis, or their respective assigns, during their lives, in equal shares and proportions, and the whole thereof to the survivor of his said daughters, or her assigns, during the life of such survivor; and from and after the decease of the survivor of his said daughter, upon trust for the heir male of the body of his said daughter, Mary Child, and the heirs, executors, and [\*198] administrators of such heir male; and in default of \*such heir male of the body of his said daughter, Mary Child, then upon trust for the heir male of the body of his said daughter, Ann Willis, and the heirs, executors, and administrators of such heir male as last mentioned; with various limitations over in case neither of his (the testator's) daughters should leave an heir male.

The testator died in the year 1803. His son, William Gilbert Child, died in the month of March, 1821, and his daughter, Mary Child, died in the month of August, 1825; both of them unmarried and without issue. Ann Willis died on the 30th of April, 1835, leaving the plaintiff her only son and heir at law.

Upon the death of Ann Willis, the plaintiff filed his bill against William Hiscox, the surviving trustee under the will, stating such part of the will as has been already set out, and alleging, that as heir male of the body of Ann Willis, he had become, in the events which had happened, absolutely entitled under the trusts of the will, to the freehold property at Stainton Dale, and praying that the defendant might be decreed to execute a proper conveyance to him of the legal estate therein.

The defendant, by his answer, admitted the terms of the will so far as they were stated in the bill, but added, among other things, that the will contained a proviso that no part of the testator's trust estates, annuities, and stock should be liable to any annuity or annuities granted by any heir or heirs at law; but that so much and such part thereof as should be made liable to such annuity and annuities should from thenceforth become forfeited to his nephew John Green, his heirs, executors, and administrators, according to the nature thereof, and which the testator did thereby devise and bequeath accordingly.

[\*199] \*The answer further stated that Ann Willis, being advised that she was seised of or entitled to an estate of inheritance in the property in question, had, by indentures of lease and release, executed in the month of May, 1833, and a common recovery, barred the entail, and settled the estate and premises at Stainton Dale, subject to such uses as she should appoint to the use of herself for life, with remainder to the plaintiff for his life only; with remainder to his first and every other son successively, in tail general; with remainder to his daughters as tenants in common in tail; with remainder to the defendant William Hiscox, the nephew of Ann Willis, and the heirs male of his body; with divers remainders over.

The defendant, by his answer, further stated that the plaintiff had, in the month of February, 1833, executed a conveyance of the estate and premises



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 1838.—Willis v. Hiscox.
 

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at Stainton Dale to certain trustees, upon trust to sell the estate and stand possessed of the proceeds upon such trusts as he should appoint; and that, by an indenture, executed at the same time or shortly afterwards, he had granted an annuity, charged on the moneys to be produced by the sale of the estate.

The defendant further said he believed that the estate had never yet been sold, but that it was, in fact, equitably charged with or liable to such annuity; and he submitted whether, by the contrivance of vesting the estate in trustees, upon trust to sell, and charging the annuity on the produce of such sale, the clause in the will, by which it was declared that such part of the estate and premises as should be liable, as was therein mentioned, to any annuity or annuities, should be forfeited, had been effectually evaded.

"The answer further stated that the defendant had been advised [\*200] that, by reason of the matters aforesaid, the nature of the estate and interest, if any, to which the plaintiff was entitled in the estate at Stainton Dale, and the effect of the annuity granted and secured by him, were very doubtful, and that the defendant ought not to execute a conveyance to the plaintiff unless under the direction of the court, and that he had, therefore, refused to comply with the plaintiff's applications to that effect.

The cause was heard upon bill and answer.

Mr. *Wigram* and Mr. *Teed*, for the plaintiff.

Mr. *Stuart*, for the defendant.

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1839; Jan. 16.—THE LORD CHANCELLOR :—The plaintiff claims as son and heir of Ann Willis.

The defendant claims under a deed declaring the uses of a recovery suffered by the plaintiff's mother Ann Willis, under which, if effectual, the plaintiff would be only tenant for life, with remainder to his first and other sons in tail; remainder to his daughters in tail; remainder to the defendant in tail male; so that, in that case, the plaintiff would not be entitled to a conveyance to himself in fee, which is the object of the bill.

The question is, whether the plaintiff is entitled, as purchaser, to the fee of the estate under the will of William Child, or whether the plaintiff's mother was, under the will, tenant in tail, and, therefore, capable of barring the plaintiff's title by a recovery, and resettling the es- [\*201] tate.

The devise was to trustees, of whom the defendant was the survivor, in fee, upon trust, after certain purposes which have failed, to pay the rents to the testator's daughter and plaintiff's mother, Ann Willis, during her life and after her decease, upon trust for the heir male of the body of his said daughter, and the heirs, executors, and administrators of such heir male.

The mother has an estate expressly for life; and after her death, the devise is to the heir male of her body, in the singular number, with words of limitation to the heirs general of such heir, which, it is clearly settled, gives an

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 1838.—Taylor v. Southgate.
 

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estate for life only to the parent, and the inheritance, by purchase, to the heir of the body, as was decided in *Archer's case*,<sup>(a)</sup> and assumed by Hale in *King v. Melling*,<sup>(b)</sup> and subsequent cases. If, indeed, that proposition were doubtful as a general rule, all doubt would have been removed in the present case; for the words of the limitation are the same as those used in the prior devise to the testator's son; and the particular description of the heir of that son proves that he must have taken by purchase.

Another objection to the plaintiff's title was raised by the answer, but not, I believe, relied upon at the bar, and which I think wholly untenable; namely, that the testator had directed that the estate devised should not be liable to any annuity granted by any heir or heirs at law, but that so much and

such part thereof as should be made liable to such annuity, should,  
 [\*202] from thenceforth, become forfeited to his nephew \*John Green; but

that the plaintiff had conveyed the estate to trustees, upon trust to sell, and had afterwards granted an annuity, and charged it upon the moneys to be produced by such sale. The attempt on the part of the testator, therefore, was to protect an estate in fee from the liability to debts and contracts of the owner; and that for ever, the proviso not being confined to the particular heir designed as devisee, but to all heirs at law; and this, if the facts stated are to be considered as true, is to be extended to prevent any alienation.

The defendant being a trustee under the will, and having set up these unfounded objections to the performance of his trust, the decree must, I think be according to the prayer of the bill, with costs.[1]

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 [\*203]

\*TAYLOR v. SOUTHGATE.

1838: November 21, 22. 1839: January 17.

A bill was filed by persons interested as residuary legatees under a will against the executors and the other persons having interests, praying the usual accounts and the administration of the estate. The executors put in their answer, not however setting out the accounts which the bill asked. Afterwards, under an arrangement to which all parties consented, the executors verified their accounts by affidavit, and the sums thereby appearing to be in their hands were paid into court in the cause. Two of the defendants then filed a second bill against the executors and against all the other parties in the former suit, and thereby, in addition to the relief prayed by the first bill, sought to charge the executors personally, on the ground of fraud and breach of trust. In May, 1835, a decree by consent was made in the first suit, by which all the accounts and inquiries usual in an administration suit were directed. The plaintiffs in the second suit afterwards brought on their suit to a hearing, but wholly abandoned the case of alleged fraud and breach of trust; and a decree was made dismissing their bill, but directing that

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(a) 1 Rep. 66.

(b) 1 Vent. 214, and see Fearne, C. R. p. 148.

[1] When costs will be decreed against trustees, see *Angell v. Davis*, post 362; *Wilson v. Wilson*, 2 Keen, 249; and see *Greenwood v. Wakeford*, 1 Beav. 581, 582; *Poole v. Pass*, id. 600; *Holford v. Phipps*, 3 Beav. 434.

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1838.—Taylor v. Southgate.

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their costs, up to the date of the decree in the first suit, should be taxed and paid out of the fund in the court in the first suit.

Upon appeal, this decree was varied, by directing that so much of the second bill, as sought to charge the executors personally, be dismissed with costs, and that the plaintiffs pay to all the defendants so much of the costs of the rest of the suit as had arisen since the decree in the first suit, and that the residue of the costs of all parties be taxed ; with a declaration that the same ought to be paid out of the estate ; any of the parties to be at liberty to apply in the first suit relative thereto, and all proceedings in the second suit to be stayed.

The decree involved so much of principle, especially with reference to the dealing with the fund in the first cause, for the purposes of costs in the second, as to render the appeal an exception to the ordinary rule which prohibits appeals merely on the question of costs.

This was an appeal from a decree of the Master of the Rolls. The appellants were the four infant defendants, Charles Taylor the younger, Charlotte Taylor, Josiah Taylor, and Sarah Taylor, by their next friend. The case stated in their petition of appeal was in substance, as follows :—

On the 2d of June, 1834, the appellants, who, under the will of their great uncle, Josiah Taylor, were interested in his residuary estate and effects, instituted a suit by their next friend, against the testator's trustees and executors, George Scrivens and James Webb Southgate, and against all other the persons claiming beneficial interests as residuary legatees in the estate, praying that the testator's will might be established, and the trusts of it carried into effect ; that the accounts \*of the real and personal [\*204] estate might be taken, and that the property might be ascertained and administered under the direction of the court. In this, which was the cause of *Taylor v. Scrivens*, the executors, Scrivens and Southgate, on the 27th of June, 1834, put in a joint and several answer ; in which, however, they did not set out the accounts of the property which had come to their hands, although such accounts were called for by the bill.

On the 5th of February, 1835, Jefferys Taylor and Martin Taylor, who were two of the defendants in the suit of *Taylor v. Scrivens*, filed the present bill against the same executors, and also against the appellants, who were the plaintiffs in the former suit, and against all the other defendants to that suit, alleging that the executors had committed divers breaches of trust and acts of fraud in the administration of the trust funds, and, in particular, that they had retained large balances in their hands, and applied part of the funds to their own use ; and praying that the testator's will might be declared well proved, and the trusts performed ; and praying, also, an account of the personal estate and effects come to the hands of the defendants, the executors ; an account of the rents, profits, and produce of the real estate which had come to their hands, or which, but for their wilful default, might have been received by them ; that the real and personal estate, remaining unsold, might be forthwith sold ; that the executors might be made personally answerable for such loss as the testator's residuary estate should appear to have sustained, by reason of their having improperly delayed to invest the trust moneys in their hands, and that an account might be taken of

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1838.—Taylor v. Southgate.

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such loss; and that they might also account for the profits made by them of the surplus balances in their hands, beyond what the purposes of the will required, or otherwise be charged with interest on the same.

[\*205] \*The defendants, the present appellants, put in their answer to this bill on the 21st of April, 1835, and thereby, among other things, stated their bill in the suit of *Taylor v. Scrivens*, and the proceedings which had been had in that suit: in particular, they stated a certain interlocutory order, referring it to the master to inquire and report as to the propriety of selling some portion of the stock of which the testator's property consisted, and the subsequent proceedings in the master's office under that reference, upon which, as the answer stated, Martin Taylor, one of the plaintiffs in the suit of *Taylor v. Southgate*, had appeared and set up a vexatious opposition, and caused much unnecessary delay and expense; but that the master having reported in favor of the sales, they took place accordingly on the 5th of April, 1835. Their answer further stated that, as it was considered beneficial to have the cause of *Taylor v. Scrivens* heard as a consent cause, considerable negotiation took place on that subject; and when it was found that the executors had omitted in their answer in that cause to set forth the accounts, it was proposed that, to avoid delay and expense, the executors should make an affidavit showing the state of their accounts as to their receipts and payments, and the balance in their hands. Their answer then set out a letter from Mr. Frowd, the solicitor for the plaintiffs in *Taylor v. Southgate*, dated the 12th of November, 1834, and sent to the solicitor for the appellants, which, in substance, expressed his acquiescence in the course suggested, viz. that a decree should be taken by consent in the cause of *Taylor v. Scrivens*, and added that, if the executors were prepared with an affidavit showing the state of the accounts and the balance in their hands, the court would be enabled to make an order directing such balance to be paid in. Their answer further stated, that, in consequence of the necessity of proving that

[\*206] \*certain of the defendants were out of the jurisdiction, and, in consequence also of dissensions among some of the defendants, it was found that the cause of *Taylor v. Scrivens* could not be forthwith brought to a hearing, and that the executors having previously, by affidavit, dated the 5th of December, 1834, stated the amount of the assets, and the particulars of the funds in their hands, an order was made, on the 9th of the same month, that the several sums of money and stock appearing from that affidavit to be then in their hands, belonging to the testator's estate, should be paid and transferred into court, and placed to the credit of the cause of *Taylor v. Scrivens*, which was afterwards accordingly done, on the 13th of February, 1835. The appellants, by their answer, further stated, that whatever delay had taken place in the cause of *Taylor v. Scrivens* had been occasioned by the conduct of the plaintiffs, and particularly of Martin Taylor; and they denied that they, or their next friend or solicitor, had in any manner colluded

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 1838.—*Taylor v. Southgate.*


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with the defendants, the executors, or either of them; and they submitted that the suit was unnecessary and vexatious.

On the 16th of May, 1835, a decree was made, by consent, in the cause of *Taylor v. Scrivens*, which directed all the accounts and inquiries which are usually ordered to be taken and made in a suit of that description. The decree also directed certain special inquiries as to the amounts of dividends and interest, which would have accrued to the estate, in case such parts of the testator's estate as did not consist of three per cent. consols, at his decease, and had not been subsequently invested by his executors in that stock, had been so invested, as well immediately upon the testator's death, as at the end of a year from that time.

The appellants entered into evidence in the cause of *Taylor v. Southgate* to show that the suit was a vexatious and useless proceeding. [\*207] The general nature and effect of this evidence are stated in the judgment.

On the 29th of January, 1838, the cause of *Taylor v. Southgate* having come on for hearing, the Master of the Rolls made a decree directing that the costs of all parties up to the 16th of May, 1835, (the date of the decree in *Taylor v. Scrivens*,) should be taxed, and paid out of the funds in court in the cause of *Taylor v. Scrivens*, and that the plaintiffs' bill should thereupon stand dismissed.

The appellants, by their petition of appeal, submitted that to the order dismissing the plaintiffs' bill should be added a direction that it be dismissed with costs, or, at least, that no part of the costs ought to be ordered to be paid to the plaintiffs out of the funds in court in the cause of *Taylor v. Scrivens*, and that the appellants' costs, except so far as they were ordered to be paid by the plaintiffs, ought to have been provided for out of the testator's estate.

Mr. *Wigram* and Mr. *James Russell*, for the appellants.

Mr. *Cooper* and Mr. *Wray*, for the defendants, the executors.

Mr. *Temple*, for residuary legatees in the same interest with the appellants.

The *Solicitor General* and Mr. *Willcock*, in support of the decree, submitted that this was nothing but an appeal for costs, which was always a matter peculiarly within the discretion of the court, and upon which, therefore, except under very special circumstances (such as did not occur in the present case,) a party could not be heard to appeal. They also contended, upon the merits, that the decree did substantial justice between the parties, and ought not to be disturbed. [\*208]

Mr. *Wigram*, in reply.—There are several reasons here why the objection of this being an appeal for costs only can have no application. The Master of the Rolls has dismissed the bill, and yet he has left the defendants to pay the costs. Such an order, in any case, would be irregular. The only reported cases in which that has been done are *Lynn v. Beaver*,<sup>(a)</sup> and *Windham*

(a) 1 Russ. 331.



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1838.—Taylor v. Southgate.

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v. *Graham*.(a) In the latter case, Lord Gifford, at first, refused to make the order, although no party opposed it ; and finally it was made by his successor at the Rolls, upon the authority of *Lynn v. Beaver*. In *Lynn v. Beaver*, the order as to costs was made by consent. But those cases, even if well decided, do not touch the present. In them the court was construing a will, and the costs were thrown upon the testator's estate. Here, the bill makes a personal demand against the executors, on the ground of a suggested breach of trust. If the suggestion were true, the executors should be charged personally ; if untrue, the party who made it should pay. The Master of the Rolls, however, has thrown the costs upon the estate. Again, an appeal always lies for costs where they are given out of a particular fund ; *Burkett v. Spray*,(b) *Jenour v. Jenour*,(c) *Taylor v. Popham*.(d) If the court can give costs out of money in court, it might charge them upon real estate being the subject of litigation, and sell the estate to pay them ; and any decree which disposes of

property must always be capable of being made the subject of appeal,  
 [\*209] whatever may be the ground \*upon which the property is dealt with.

An appeal will also lie for costs where the error is apparent upon the face of the decree, and where the point can be agitated without discussion of the merits ; *Owen v. Griffith*.(e) In this case, the dispute in the cause was personal between the plaintiffs and the executors only. The court has ordered the costs to be paid by parties in the cause who were no parties to, but who in fact objected to, the litigation. The issues raised determine this question without going into the merits. The appeal is not confined to the costs ordered to be paid. The court should not only not have given any costs to the plaintiffs, but should have given the appellants all their costs personally against the plaintiffs. The appellants, having got a *locus standi in curia* with respect to the costs improperly ordered to be paid out of the estate, may deal with the question as to the general costs, although these costs by themselves could not be the ground of an appeal ; *Attorney General v. Butcher*,(g) and the cases cited in the notes to *Owen v. Griffith*,(h) and *Burkett v. Spray*.(i)

Upon the merits, the appellants are clearly right. They could not apply to stay the proceedings in *Taylor v. Southgate*, upon obtaining the decree in *Taylor v. Scrivens* ; because the former suit sought personal relief against the trustees and executors, which the latter did not ; *Shepherd v. Towgood*.(k) And the appellants, as well before the decree in *Taylor v. Scrivens*, as at all times since, and especially by their answer in *Taylor v. Southgate*, have protested against the litigation in that suit as useless and improper. The decree of the Master of the Rolls has determined that the appellants  
 [\*210] have been \*right, and the plaintiffs in *Taylor v. Southgate*, wrong,

(a) Turn &amp; Russ. 63.

(b) 1 Russ. &amp; Mylne, 113.

(c) 10 Ves. 562.

(d) 15 Ves. 72. See also *Malone v. Clark*, 1 Moll. 15 ; and *Eyre v. Marsden*, p. 231, *infra*.

(e) Amb. 520.

(g) 4 Russ. 180.

(h) Amb. p. 521, Blunt's ed.

(i) 1 Russ. &amp; Mylne, p. 115.

(k) Turn. &amp; Russ. 379.



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1838.—Taylor v. Southgate.

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and yet his Lordship makes the appellants contribute to the plaintiff's costs, and leaves them, to a great extent, to pay their own costs.

1839; Jan. 17.—THE LORD CHANCELLOR:—In this case it is clear, that much unnecessary expense has been incurred; and the question is, whether it ought to be paid out of the testator's estate.

It is not disputed that the circumstances of the property, which is the subject matter of the suit, required the aid of this court in the administration of it.

On the 2d of June, 1834, a bill was filed for that purpose, to which Jefferys Taylor and Martin Taylor, who had interests in the estate, were defendants. It prayed the usual directions and accounts, and stated all that was necessary with that view. This was the cause of *Taylor v. Scrivens*. The suit was an amicable one, that is, nothing hostile was alleged against the executors; but there is no appearance of any improper collusion between the plaintiffs and the accounting parties, who appeared by different solicitors. The answer did not contain the accounts of the executors; but, this being objected to by the solicitor for Jefferys Taylor and Martin Taylor, it was proposed that an affidavit should be made of the state of the funds, and produced at the hearing, which it was expected would take place in November, 1834, and when it was proposed to take a decree by consent. To this Mr. Frowd the solicitor for Jefferys Taylor and Martin Taylor assented, but afterwards pressed the solicitor for the plaintiffs to take exceptions, which he declined doing; and on the 24th of November, 1834, Mr. \*Frowd wrote to [\*211] him, that, unless a decree were obtained on or before the 9th of December, and an affidavit made by the executors, showing the balance in hand, and the application of the testator's funds, he should file a cross bill against the executors, and endeavor not to burthen the estate with the costs, but fix the executors personally with them. The affidavit was in fact made on the 5th of December; but the decree was not taken, as had been intended, owing as it was alleged, to the necessity of proving that some of the parties were out of the jurisdiction.

On the 5th of February, 1835, another bill was filed by Jefferys Taylor and Martin Taylor, stating various breaches of trust against the executors, and praying that they might be charged with what, but for their wilful default, they might have received, and with interest upon balances.

On the 13th February, 1835, the funds were transferred into court in the first suit; and, in April, the defendants answered the second bill, and on the 16th of May, a decree was taken by consent, in the first cause. This decree contained all the usual inquiries, together with some special inquiries for the purpose of apportioning the funds between the tenant for life and the remainder-men; but none which appear to have been directed hostilely against the executors, or with a view of making a case against them upon further directions;—certainly none that could have made the prosecution of the second

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1838.—Taylor v. Southgate.

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suit unnecessary, if there had been a case to entitle the plaintiffs in that suit to any such decree as they prayed for.

It appears from Mr. Frowd's letter of the 1st of December, 1835, [\*212] that he proposed at the time that the decree \*should be in both causes, for the purpose of having the costs of both suits paid out of the estate; and he then renewed the proposition so to provide for the costs of the second suit. This proposition was, I think most properly, declined. As the second suit was constituted, it was clear that the costs of it would be to be paid by the executors if the case stated were proved, or by the plaintiffs if it should prove to be unfounded.

Upon this refusal, Mr. Frowd, in his letters of the 2d of December, 1835, and 10th of December, 1835, states that he should proceed with the suit; that is, that he would proceed for the costs only; for it cannot be supposed, after what had passed, that he believed that he could prove any part of the case against the executors, as stated by the bill.

Accordingly, the second suit was prosecuted, and came on for hearing on the 29th of January, 1838, when the bill was dismissed, and the costs of all parties up to the date of the decree in the first suit, including those of the executors, were ordered to be paid out of the fund in court in the first suit.

It is to be observed, that as the second suit prayed for more than the decree in the first suit had given, and attempted to make a case against the executors, the other parties could not support any application after the decree, to stay the further prosecution of the second suit; and the plaintiffs in that suit having proceeded, and having either abandoned, or failed in proving, the case alleged, it was, I think, due to the executors, and to the estate, that the plaintiffs in the second suit should pay the whole of such of the costs of that suit as arose from the attempt to make the case against the executors;

[\*213] that is, that so much of the bill should be dismissed \*with costs.

And as all the costs of the other part of the suit, subsequent to the decree in the first suit, arose from the case against the executors having been made part of the suit, which prevented any order being obtained for staying it, in the usual manner, I think that the plaintiffs in the second suit ought to pay all the costs of that suit subsequent to the decree in the first suit.

Much as it is to be regretted that the plaintiffs in the second suit should have filed their bill at all, yet they were not bound to wait, in the hope that the plaintiffs in the first suit would duly prosecute their suit and obtain a decree. I therefore think that they were, in strictness, justified in filing an ordinary bill for the usual accounts; and if their suit had been confined to that object, it would have been of course, either to have made one decree in both causes, or to have directed the second suit to be stayed on payment of the costs of that suit up to the decree in the first suit; and I think the plaintiffs in the second suit are now entitled to the latter order; but I cannot make or support a decree or order in *Taylor v. Southgate*, to pay costs, out of a suit in *Taylor v. Scrivens*. The decree is in *Taylor v. Southgate* only;

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 1838.—*Morison v. Morison*.
 

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but it directs payment of the costs of that suit out of funds in court in *Taylor v. Scrivens*, and that without any regard to the costs in *Taylor v. Scrivens* which constitute the first lien and claim upon such funds.

It also appears to me that so much of the bill as prayed for the usual accounts being a proper bill in its origin, and the decree for that purpose being refused only on account of a prior decree for the same purpose obtained in the first suit, ought not to be dismissed, but the further prosecution of it stayed.

\*The order therefore, which I propose to make is, that so much of [\*214] the bill as seeks to charge the defendants personally be dismissed with costs, and that the plaintiffs be ordered to pay to all the defendants so much of the costs of the rest of the suit as have arisen since the decree in the first suit: and that the residue of the costs of all parties be taxed; with a declaration that the same ought to be paid out of the testator's estate, and that the parties are to be at liberty to apply relative thereto in the first cause, and that all proceedings in the second cause be stayed.

It was contended that this application, being for costs only, ought on that account to be dismissed. I have no disposition to encourage appeals for costs only. This, however, is not simply a question whether any party shall pay or receive costs; but the case involves so much of principle, particularly as to ordering the fund in the first cause to be applied towards payment of the costs of the second suit, by a decree in the second cause only, that I think this case is within the exception to the rule.[1]

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\*Between MARTHA MORISON, MARY MORISON, MAGDALEN MORISON, ELEANOR MORISON, and GEORGE MORISON, Infants, by ALEXANDER MORISON, their next Friend, Plaintiffs; THEODORE MORISON, JOHN MORISON, EDWARD ELLICE, CHARLES ROSS, JOHN REID, THOMAS MANN, WILLIAM GORDON, and ELEANOR IRVINE, Defendants. [\*215]

And between the said MARTHA MORISON, MARY MORISON, MAGDALEN MORISON, ELEANOR MORISON, and GEORGE MORISON, Infants, by the said ALEXANDER MORISON, their next Friend, Plaintiffs; MARY MANN, Defendant.

And between the said ELEANOR MORISON, and GEORGE MORISON, Infants, by the said ALEXANDER MORISON, their next Friend; WILLIAM WYLLIE, the elder, and ELEANOR MARTHA WYLLIE, and WILLIAM WYLLIE, the younger, Infants, by the said WILLIAM WYLLIE, the elder, their Father and next Friend; and HENRY DICKINSON, the younger, and FRANCES

[1] The question whether an appeal would lie upon a matter of costs was more fully considered in *Angell v. Davis*, post 360; and see *Byre v. Marsden*, post 231, 241; 4 Russ. 181, n. 7; 1 Russ. & Myl. 115, n. 1.

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 1838.—Morison v. Morison.
 

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DICKINSON, and HENRY DICKINSON, Infants, by the said HENRY DICKINSON, the younger, their Father and next Friend, Plaintiffs; The said JOHN MORISON, EDWARD ELLICE, CHARLES ROSS, JAMES WYLLIE, HENRY DICKINSON, the elder, and HENRY JOHNSON, and WILLIAM GORDON and ELEANOR his Wife, late ELEANOR IRVINE, Defendants.

*And between* WILLIAM DICKINSON, and ELEANOR his Wife, late ELEANOR MORISON, and GEORGE MORISON, an Infant, by ALEXANDER [\*216] \*MORISON, his next Friend; WILLIAM WYLLIE, the elder, ELEANOR MARTHA WYLLIE, and WILLIAM WYLLIE, the younger, Infants, by the said WILLIAM WYLLIE, the elder, their Father and next Friend; HENRY DICKINSON, the younger, FRANCES DICKINSON, and HENRY DICKINSON, Infants, by the said HENRY DICKINSON, the younger, their Father and next Friend, Plaintiffs; JOHN MORISON, EDWARD ELLICE, CHARLES ROSS, JAMES WYLLIE, HENRY DICKINSON, the elder, HENRY JOHNSON, PHILIP CHAMPION TOKER, and HARVEY DICKINSON, and WILLIAM GORDON, and ELEANOR his Wife, out of the jurisdiction of the court, Defendants.

By original bill and bills of revivor and supplement.

1838: June, 26, 27; December, 5.

The court will not suffer the proceedings in a cause to be impeached on the ground of irregularities of which the persons complaining have been themselves the authors; and if all persons interested in the subject matter of the suit have been substantially parties to all the subsequent proceedings, none of them can be permitted to escape from the effect of such subsequent proceedings by showing prior irregularities; and no difference in this respect is caused by the circumstance that some of such parties are infant plaintiffs.

The appointment of a defendant who is an executor and trustee to be a consignee, with the usual profits, is a matter for the discretion of the court; but when such a discretion has been exercised, and an appointment made under it has been acted upon, the court will not afterwards withdraw its sanction from the appointment so made.

THIS was the petition of appeal of the above named plaintiffs William Dickinson and Eleanor his wife, late Eleanor Morison, and George Morison, late an infant, William Wyllie, the elder, Eleanor Martha Wyllie, and William Morison Wyllie, (in the third mentioned cause called William Wyllie, the younger,) infants, by William Wyllie, the elder, their father and next friend, Henry Dickinson, the father, (in the last of the above mentioned causes called Henry Dickinson the younger,) and Frances Dickinson and Henry Dickinson, the son, infants, by Henry Dickinson, the younger, their father and next friend, and of Maria Dickinson, an infant, the daughter of the petitioners William Dickinson and Eleanor his wife.

[\*217] \*The petition of appeal, which was intituled in the four above-mentioned causes, sought to set aside so much of the decree made at the hearing of the cause on the seventh of March, 1817, as gave liberty to any of the parties to propose the defendants, the executors, or any or either of them, or any firm or house of trade to which they or he might be-

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 1838.—*Morison v. Morison*.
 

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long, to be a consignee or consignees of the West India estates of the testator in the cause. It also sought to set aside the order of the 21st of April, 1826, by which the master's general report of the 18th of January, 1826, was absolutely confirmed, and so much of the order on further directions, of the 15th of May, 1827, as ordered that the defendant Edward Ellice should be continued consignee of the testator's estates, and so much of the order of the 3d of May, 1833, as directed that, in the accounts to be taken under the decree, the house of Inglis, Ellice & Co. were to be considered consignees of the rents and produce of the testator's estates in the island of Tobago, and entitled to charge the estates in that character, from the death of the testator until the day of the appointment of Ellice to be such consignee under the decree, and as declared that, under such appointment, Ellice was entitled to account as consignee, and to charge in the same manner as any other consignee would have charged who had been appointed under the decree, and as declared that, with respect to several of the items objected to by the appellants, though they would not be warranted by the general principles of the court as applied to the relation of principal and agent, yet they appeared to be justified by commercial law and usage.

The decree of March, 1817, and the subsequent orders which were the subject of the appeal, were impeached, principally upon two grounds; first, that the leave given to the parties to propose Mr. Ellice, he being at the time an executor and trustee, to be consignee, and his \*appointment. [\*218] to that office, were, under the circumstances, improper and unwarranted; and, secondly, that the proceedings in the cause, subsequent to that appointment, and by which it had been recognized and confirmed, had been wholly irregular in point of form, and were therefore a mere nullity.

Mr. *Knight Bruce*, Mr. *Wigram*, and Mr. *Teed*, in support of the appeal.  
Sir *W. Horne*, Mr. *Jacob*, and Mr. *Sharpe*, contra.

The history of the different proceedings in the cause, and the various points in which they were alleged to have been irregular, are particularly stated and considered in the judgment.

With respect to the allowances made to consignees and their peculiar character and rights, the following cases were referred to; *Ex parte Read*, (a) *Leith v. Irvine*, (b) *Marshall v. Holloway*, (c) *Bunbury v. Winter*, (d) *Moore v. Frowd*, (e) and an unreported case of *Law v. Bruce*, before Sir W. Grant.

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*Dec. 5.*—THE LORD CHANCELLOR:—George Morison, the father of the plaintiffs in the original cause conveyed by a deed of settlement certain West India property to trustees, upon trust to divide the property or its proceeds among his five children, and by his will, of subsequent date, he devised certain other real estates, also in the West Indies, and likewise gave his personal estate, upon trust for the same, or nearly \*the same purposes [\*219]

(a) 1 Gl. &amp; Jam. 77.

(b) 1 Mylne &amp; Keen, 277.

(c) 2 Swan. 432.

(d) 1 J. &amp; W. 255.

(e) 3 Mylne &amp; Craig, 45.



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as those mentioned in the deed. The defendant, Edward Ellice, was one of the trustees and executors named in the will ; but he was not a trustee of the settlement. The testator, at his death, left one son and four daughters surviving him. One of the daughters died in her minority ; the other three daughters married. Shortly after the testator's death, a suit was instituted for the purpose of having all the property comprised in the settlement and will administered under the direction of the court ; and the history of the proceedings in the suit is very important to be attended to in disposing of the questions which are raised upon this appeal.

In the month of February, 1815, the original bill in this cause was filed, all the children, five in number, being co-plaintiffs, by their next friend. Martha Morison, the eldest daughter, who afterwards became the wife of William Wyllie, the elder, Mary, who became the wife of Henry Dickenson, and Eleanor, who became the wife of William Dickinson, all married during the progress of the suit, and before they came of age.

The bill prayed the usual accounts of the estates which passed under the deed and will.

In the month of March, 1817, the original decree, one of the proceedings which is the subject of this appeal, was pronounced. It directed that the usual accounts should be taken, and it contained this special direction, which is the ground of the whole contest that has arisen in the cause, viz., that the master should "appoint a proper person or persons to be a consignee or consignees of the rents and profits of the testator's West India estates, and make him or them a proper allowance in respect thereof ; and that any of the parties should be at liberty to propose the defendants, the executors, or [<sup>\*220</sup>] any of \*them, or any house of trade to which they or he might belong, to be such consignees or consignee."

That decree, though made in the month of March, 1817, did not produce a report appointing a consignee until the month of March, 1819 ; but in the meanwhile, Martha Morison, one of the plaintiffs in the original cause, intermarried with William Wyllie the elder ; and, upon her marriage, which took place in the month of August, 1818, a settlement was made, of which Ellice was named a trustee, and the principal object of which was to settle her share of whatever property might be coming to her under the deed and will, to her separate use for life, and after her death, to her husband for life, with remainder to her children. On the 16th of January, 1819, an order of revivor of the original suit was obtained. It appears, however, that at that time there was no bill upon the file ; for, although a bill of revivor is stated to have been actually drawn in the names of the other infant plaintiffs only, against Martha Wyllie and her husband, it was not filed until the 31st of March ; and although, on the 15th of May following, an order was obtained to make the defendants Martha and her husband co-plaintiffs, instead of defendants, she having been a co-plaintiff in the original bill, that order was never acted



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on. In the month of April, in the same year, 1819, Magdalen Morison, one of the co-plaintiffs in the original bill, died, an infant and unmarried.

Thus stood the cause until the month of June, 1820, when Mary Morison, another of the plaintiffs, being still under age, intermarried with Henry Dickinson, and on that occasion a settlement was executed, very much to the same effect as that which had been made on the marriage of her sister Martha.

\*In the month of March, 1822, Martha Wyllie died, whereupon [\*221] her husband became, under the marriage settlement, tenant for life of the proceeds of her share. In the month of December, 1823, Mary Dickinson died, leaving children; and on the 17th of December, 1825, a bill of revivor and supplement was filed by such of the original infant plaintiffs as were unmarried, by Mr. Wyllie and his children, and by Mr. Henry Dickinson and his children. That bill stated the marriages of Mr. and Mrs. Wyllie and of Mr. and Mrs. Henry Dickinson, and the settlements executed on the occasion of those respective marriages, and that upon Mrs. Wyllie's marriage the suit had been revived; and it prayed the benefit of the original decree pronounced in the year 1817.(a)

The master, by a separate report, of the 16th of March, 1819, had appointed Ellice consignee; and he made his general report on the 18th of January, 1826. That report was made in all the causes then existing, and, among others, in the suit which was instituted in December, 1825, so that to that report the infant plaintiffs, and Mr. Wyllie and Mr. Dickinson, as well as the children of those gentlemen, were all parties. The master therein stated that, by his report of March, 1819, he had appointed Ellice consignee, and that the firm in which Ellice was a partner had acted as consignees during the lifetime of the testator, and had continued from that time down to the time of the report to act in that capacity. In the month of March, 1826, Eleanor Morison, another of the plaintiffs in the original suit, while yet an infant, married a gentleman of the name of William Dickinson; and a settlement of her share of the property was then made, and Mr. Ellice was also appointed a trustee of that settlement. On the 21st of the following April, an order was made \*in the three first-mentioned causes, by which the [\*222] Master's report was absolutely confirmed.

In January, 1827, a bill of revivor and supplement was filed upon that marriage of Eleanor, being the fourth-mentioned suit; and in that suit the other parties, the Wyllies and Dickinsons, were made co-plaintiffs. But no order or decree was made in that suit, to revive the former suit or carry on the proceedings. The cause came on for further directions in the month of May, 1827, upon the master's general report, when a decree was made in all the four suits. That decree was quite a matter of course so far as regarded the accounts, and it directed that Ellice should be continued as consignee.

(a) No order of revivor or supplemental decree was ever made in this cause.

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Thus the matter went on till the year 1830, when Mr. Ellice presented a petition praying that he might no longer act as consignee, and upon that application, an order was made for the appointment of another consignee.

In the month of February, 1831, a petition was presented by Mr. and Mrs. Wyllie, Mr. and Mrs. William Dickinson, and all the infant plaintiffs, praying that the order on further directions, of May, 1827, might be reheard and declared void, and also praying a reference and inquiries upon certain points not now in discussion, and in which the subject matter of the present complaint was not brought under the consideration of the court at all. In the month of April, 1831, an order was made upon that petition, giving the petitioners liberty to go before the master and object to the different items comprised in the schedules to his report, and also in the accounts of Mr. Ellice as consignee. A supplemental order in November, 1831, was afterwards made, in explanation of the order of April, and directing that none of the proceedings in the cause should be so used as to preclude the plaintiffs from the investigation of every item in the accounts, or from any objection to [\*223] any such item under the reference. A further application was made in April, 1832, praying, among other things, that Mr. Ellice's accounts might be taken as those of a trustee, and not as those of a consignee. The order then pronounced, however, was merely that the master should be at liberty to make a separate report as to certain items in Mr. Ellice's accounts. Another order was subsequently made on the 3d of May, 1833, upon the petition of the same parties, by which it was declared, that Mr. Ellice was to be considered as entitled to have his accounts taken as consignee. The decree of March, 1817, the order of April, 1826, the order on further directions, of May, 1827, and the last mentioned order, of the 3d of May, 1833, form the subject of the present appeal.

Thus far I have stated the proceedings in these causes in detail, because the whole question as to the appeal from the decree of March, 1817, depends upon an accurate view of them. Whatever irregularities may have taken place in some of the subsequent proceedings, none can be imputed to the conduct of the cause up to the date of that decree.

The house in which Mr. Ellice was a partner had been consignees employed by the testator, he having by deed vested certain of his West India estates in trustees, of whom Mr. Ellice was not one, upon trust to sell and to divide the proceeds amongst his children; and having by his will devised other estates for similar purposes, and appointed Mr. Ellice executor and one of the trustees. The bill prayed and the decree directed the usual accounts and the reference to appoint a consignee. The parties were to be at liberty to propose any one, although named as an executor. Under this reference the master approved of Mr. Ellice as consignee, although he was an [\*224] executor and trustee under the will. His appointment was confirmed in the year 1819. By the decretal order on further directions, made in the year 1827, Mr. Ellice was continued as such consignee; and

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from the time of his appointment, until he was discharged, upon his own application, in the year 1830, he, under the authority and by the appointment of this court, acted as such consignee. And now, after the lapse of twenty-one years from the date of the decree, I am asked to alter the decree of March, 1817, by omitting the permission to appoint an executor a receiver, for the avowed purpose of having all Mr. Ellice's accounts taken over again, as accounts of a trustee simply, and not as accounts of a consignee: that is to say, after the parties have for so many years received all the assistance and accommodation which consignees are in the habit of affording, and which they do only afford, in consideration of the remuneration and profits incident to that office, the appellants ask this court to leave them in possession of all the advantages, and to deprive the party who has afforded those advantages of all his remuneration and profits.

I am considering this case now without reference to the subsequent conduct of any parties under the appointment, and simply upon the proposition of cancelling, in the year 1838, an authority to appoint a consignee in the year 1817.

That it was competent for the court to appoint an executor and trustee a consignee with the usual profits cannot be disputed. If there could have been any doubt upon that subject, Lord Eldon's decree in *Marshall v. Holloway*,<sup>(a)</sup> would be sufficient to remove any such doubt. It was a matter, not of right, but for the discretion of the court. I am at a loss to \*conceive any case in which a discretion of that kind, exercised and [\*225] acted upon, can, at a subsequent period, be withdrawn, with any regard to justice. If such a course were to be adopted, the security now supposed to be derived from the sanction and authority of this court would cease to exist. A guardian applying the income allowed by the court for the maintenance of an infant, might, at a subsequent period, be told that the court had exercised its discretion improvidently in making so large an allowance, and might be left to pay the difference himself. And who are the parties who now pray for this alteration in the decree of 1817? The husbands of the testator's daughters, one of whom has been, for all practical purposes, a co-plaintiff in the suit since the year 1819—another, since the year 1825—and another since the year 1827; and all of whom were parties to the order on further directions by which Mr. Ellice was continued as consignee. These persons, or their wives, for their separate use, have enjoyed, up to this day, the life income of the property, and are therefore most affected by any unnecessary expense of management; and the complaint is not made by these adult and competent parties until twenty-one years after the decree.

But their infant children, it is urged, are also appellants. Those children all derive title from their mothers, and can have no better title than their parents had; the parents were all plaintiffs in the original cause; and the pre-

(a) 2 Swan. 432.

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sent infants have been plaintiffs since ; and as decree is as binding upon infant plaintiffs as upon adults ; *Lord Brook v. Lord Hertford*,<sup>(a)</sup> *Gregory v. Molesworth*.<sup>(b)</sup>

[\*226]     \*It was contended, indeed, that owing to some irregularities in reviving the suit upon the marriages of the infant plaintiffs, the proceedings had been defective from the periods of such marriages ; and certainly there were such irregularities, of which the most important was upon the marriage of Mrs. Wyllie, formerly Martha Morison. An order to revive was obtained before any bill was filed. Afterwards a bill was put upon the file, making Mr. and Mrs. Wyllie defendants ; and then came an order giving leave to amend by making them co-plaintiffs ; an order, however, which does not appear to have been acted upon. But whatever irregularities there may have been in these proceedings, if I find that all the persons interested were substantially parties to all the subsequent proceedings, it cannot be permitted to any of them to escape from the effect of such subsequent proceedings by showing prior irregularities. The cases of *Wall v. Bushby*,<sup>(c)</sup> and *Tillotson v. Hargrave*,<sup>(d)</sup> prove that such were the opinions of Lord Thurlow and Sir John Leach.

Now I find that Mr. Wyllie and Mr. Henry Dickinson, whose wives had both died previously, were, together with their children, plaintiffs in the bill filed in December, 1825 ; and that such bill states the revival of the suit upon the marriage of Mr. and Mrs. Wyllie. I also find that the report of January, 1826, was made in several causes, one of which was that of December, 1825 ; that the Wyllies and the Dickinsons were co-plaintiffs in the bill filed in the year 1827, after the marriage of Eleanor with William Dickinson ; and that the order upon further directions, in the same year, was made, amongst others, in the two last causes, so that all the parties now complaining

[\*227]     were parties to the \*report, and to the order on further directions made thereon. It is also to be observed, that the irregularities relied upon were irregularities of the plaintiffs ; that is, of the very parties now seeking to take advantage of them, against a defendant who was no party to them, and cannot be affected by them. I also find that all these parties petitioned for a re-hearing of the order upon further directions of May, 1827, as to a particular point not now in question, and that no complaint was then made of that part of the order which continued Mr. Ellice as consignee ; and that, on the 6th of December, 1830, a variation was, upon his petition, made in that order upon further directions ; so that as far as relates to that order, this is a second appeal, or rather an attempt to appeal “piecemeal,” as it has been called.

I am, for these reasons, of opinion that there is no ground upon which the appeal against the decree of March, 1817, or the order upon further directions made in May, 1827, can be maintained. So far, therefore, the appeal must be dismissed, with costs.

(a) 2 P. Wms. 518.

(b) 3 Atk. 626.

(c) 1 Bro. C. C. 484.

(d) 3 Mad. 494.

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The remaining point for consideration is the appeal against the order of the 3d of May, 1833. The report of January, 1826, was regularly confirmed, and the decree, upon further directions, of May, 1827, was founded upon it.

On the 20th of April, 1831, the present appellants obtained an order at the Rolls, upon their petition, by which they were permitted to object to any of the items in Mr. Ellice's account contained in the report of January, 1826, as if the items had never been allowed. On the 30th of November, 1831, the appellants obtained another order, declaring that none of the proceedings in the cause were to be used so as to preclude the plaintiffs \*from [\*228] all investigation of any items in the accounts, or from any objections to any such items under the former reference. The master conceiving himself to be, as undoubtedly he was bound to consider Mr. Ellice's account as the account of a consignee, the plaintiffs afterwards presented another petition, praying that the master might take the account as the account of a trustee. But they did not obtain any order for that purpose; the order which they did obtain, of the 17th of April, 1832, being confined to directing the master to make a separate report of the items objected to.

I do not enter into any consideration of the facts submitted to the court as the ground for these orders; but I must observe, that the orders themselves, whatever those facts may have been, were in the highest degree irregular. If a decree be obtained under such circumstances as may justify the court in considering it as a nullity, it may, in some cases, be got rid of by motion or petition; but if the decree be regular in itself, no error it may contain can be set right in that manner: and even if it were obtained by fraud, it can only be set aside by a bill. Nevertheless these orders, upon the ground of fraud or error upon accounts settled by a report which had been confirmed five years before, set aside a decree made upon such report.

The result of these proceedings affords a striking proof of the impolicy of departing from the established practice of the court: for the master having, upon sixty-one objections taken to the draft of his report, disallowed them all, upon the ground that the items objected to were not open to objection as items in a consignee's account; the plaintiffs, in 1833, renewed their attempt, and presented a petition to the Master of the Rolls, not for the mere purpose of bringing the objection before \*the court by way of excep- [\*229] tion to the report, but praying that the master might review his report upon the points objected to; and that he might be directed to take the accounts as the accounts of a trustee; with many other declarations as to particular charges depending principally upon such directions. The Master of the Rolls, however, by his order of the 3d of May, 1833, declared that Mr. Ellice was properly considered as a consignee, and that the items objected to appeared to be justified by mercantile law and usage; and the report was confirmed as far as regarded such accounts.

The result, therefore, was, that after all the expense incurred, the account remained as it was settled and stated in the report of January, 1826. This



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order, however, is included in the appeal, so far as it declares that the defendant Ellice is to be considered as a consignee: but the sixty-one objections to the account were not brought before me, and I have not been asked to allow them; and, if Mr. Ellice is to be considered as consignee, it was, I presume, not thought possible to support them.

One subject of these objections was indeed relied upon in argument, though not in the terms of the objection; namely, the amount of charges for the freight of stores and supplies sent out by the consignees in their own ships, the case and evidence as to which occupy twenty-five brief sheets of the master's report. I do not think that this case is open upon the petition of appeal; but I have carefully perused the report; and the result of the evidence for the plaintiffs, is, that freight was in many instances, under particular circumstances, obtained at a lower rate. But the evidence for the consignee

proved that the freight charged was according to the rate settled by [\*230] the trade: that it was the \*usual rate under the circumstances existing as to the property, and was the same as the house charged to all their other customers. Upon this evidence, if I had been considering the case as upon the report of January, 1826, I should have thought the case of the consignee fully made out. But I cannot throw out of my consideration the fact that the charge was allowed in 1826, in the presence of Mr. Wyllie and Mr. Henry Dickinson, who now complain of it, who, as tenants for life, were mainly interested in that question, and who represented, as next friends, their infant children, who were co-plaintiffs.

I am, therefore, of opinion that there is a decisive answer upon the merits, as well as upon form, to the case made by the appellants, and that the whole of the appeal must be dismissed with costs.

In the view I have taken of this case it has formed no part of my duty to consider the merits or demerits of the conduct of the parties. It is, however, but justice to observe that the appeal from the order of May, 1833, not bringing before me the sixty-one objections submitted to the master, seems to assume that no objection can be maintained to the account of Mr. Ellice, as settled by the master, if he is to be considered as consignee.

If, however, the interests of the parties claiming under the testator have not been duly attended to, the appellants have not adopted the proper means of obtaining redress, if redress were within their reach; and if no means existed of obtaining redress, those parties who, being adult, have paid so little attention to their own interests, and to those of their children, whilst these proceedings were in progress, cannot reasonably complain that the court cannot, after what has taken place, afford redress, in the present form, for any injury which may have been sustained.



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\*EYRE v. MARSDEN.

[\*231]

1838 : December, 6, 7. 1839 : January, 16.

A testator gave his real and personal estate upon trust, after payment of his debts and funeral and testamentary expenses, and the costs and charges attending the execution of his will, to pay out of the annual produce certain annuities to his three children, for their respective lives, requesting that the surplus of the annual income might be applied in accumulation of the capital of his property for the benefit of his grandchildren ; and that at the death of the survivor of his children, the trustees should convert all his property into money, and divide the same, after deducting the expenses of performing his will, among all his grandchildren living at his decease ; and in case any of his said grandchildren should die before their shares should become payable by virtue of his will, leaving issue, such issue to be entitled to the share which their parent would have been entitled to if then living ; but in case of the death of any of his said grandchildren without leaving issue, and before becoming entitled to receive their respective shares, the testator then gave the shares of such deceased grandchildren equally among his surviving grandchildren, to be paid at the same time and in the same manner as before mentioned touching the original shares of his grandchildren.

The testator left his three children, and also ten grandchildren, surviving him. A suit was afterwards instituted for the administration of the estate, in which the annual income was paid into court, and accumulated during the lives of the annuitants. At the death of the last surviving annuitant, which took place about thirty years after his death, only five of the grandchildren were living ; but two of those who were dead had issue living, and the remaining three were dead without issue. It was held, that the issue of the two deceased grandchildren were entitled, not only to the original shares of their respective parents, but also to the interests which such parents, if living, would have taken in the shares of those grandchildren who were dead without issue.

The costs of the suit, which the order of the court below had thrown exclusively on the excess of accumulations, arising from the annual produce of the trust estate after the period allowed by the Thellusson act, were, upon appeal, directed to be paid out of the general estate of the testator, including the fund accumulated within the permitted period, except the costs incurred in the separation of the excessive accumulations, which costs were directed to be paid out of such excessive accumulations.

An appeal against such an order is an exception to the ordinary rule prohibiting appeals merely upon costs.

THE will of Joseph Wildsmith, dated the 11th of January, 1804, after directing that all his just debts, funeral and testamentary expenses should be paid by his trustees and executors thereafter named, out of his real and personal estate, and after making certain specific and pecuniary devises and bequests, gave and devised all other his real and personal estate to three trustees (whom he also appointed his executors,) their heirs, executors, &c. ; upon trust, when they should think proper, to convert all or any part thereof into money, \*and, after payment of his debts and funeral and testa- [\*232]mentary expenses, and the costs and charges attending the execution of his will, upon trust to pay a guinea a week to each of his two sons, Joseph Wildsmith and Benjamin Wildsmith, and an annuity of 54*l.* 12*s.*, payable half yearly, to his daughter Elizabeth Eyre, for their respective lives.

The will then proceeded in these words ;—" which said annuity and weekly payments I direct to be made by my said trustees out of the rents, interest, and annual produce of my estate and effects ; and the surplus of such an-

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nual income, if any, I request may be applied in accumulation of the capital of my property, for the benefit of my grandchildren. And from and after the death of my said children, the said Joseph Wildsmith, Benjamin Wildsmith the elder, and Elizabeth Eyre, and the longest liver of them, then upon trust that they, my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall sell and convert into money all such part of my estate and effects as shall not consist of specie, and, from time to time, call in and receive the money which shall be placed out upon security as aforesaid, and pay, distribute, and divide the same, after deducting the expenses of performing this my will, and the legacies hereinafter mentioned, unto and amongst all and every my grandchildren who shall be living at the time of my decease, equally, share and share alike. \* \* \* \* And I do will and direct that the shares of such of my said grandchildren as shall be under the age of twenty-one years, at the time of the decease of the survivor or longest liver of my said children, shall be placed out or continue upon security; and the interest thereof shall be applied in the maintenance of my infant grandchildren, during their respective minorities. And in case any of my said grandchildren shall die, before, his, her, or their share or [\*233] shares of my estate and effects shall become payable by virtue of this my will, leaving lawful issue, then such issue shall be entitled to the share or shares which his, her, or their deceased parent or parents would have been entitled to, if then living. But in case of the death of any of my said grandchildren, without leaving issue, before he, she, or they shall become entitled to receive his, her or their share, or respective shares of my said estate and effects, in manner aforesaid, then I give and bequeath the share or shares of such deceased grandchild or grandchildren unto and equally amongst my surviving grandchildren, to be paid at the same time and in the same manner as before mentioned touching the original share or shares of my said grandchildren."

The testator died on the 19th of October, 1804, leaving his said two sons, Joseph Wildsmith and Benjamin Wildsmith, and his daughter Elizabeth Eyre, surviving him, and also leaving ten grandchildren, namely, Mary Ann Wildsmith, afterwards Mary Ann Smith, (the only child of Joseph Wildsmith,) and Benjamin Wildsmith, the younger, Catherine Wildsmith, Joseph Wildsmith, the younger, Elizabeth Wildsmith, afterwards Elizabeth Ramsay, John Peter Wildsmith, and Mary Ann Wildsmith, afterwards Mary Ann Cosins (the children of Benjamin Wildsmith;) James Eyre (the only child of Elizabeth Eyre,) and Francis Maceroni and George Maceroni (the children of a daughter who had died in the testator's lifetime.)

In the month of December, 1812, a bill was filed by the testator's three children, and by all the grandchildren, against the surviving executors and trustees, praying that the will might be established and the trusts thereof carried into execution; that an account might be taken of the real and personal estates; and that the clear residue might, after setting apart sufficient

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to answer the annuities, be invested and secured for the benefit of the parties interested and that the rights of those parties might be ascertained and declared. [\*234]

In the month of August, 1817, the cause was brought to a hearing, when a decree was made, directing all the accounts and inquiries which are usual in a suit of that description. In consequence of changes which subsequently took place in the state of the testator's family and other circumstances occasioning transfers of interests, it became necessary that a bill of revivor and supplement should be filed for the purpose of prosecuting the decree, which was done accordingly. On the 19th of October, 1825, the period of twenty-one years having then elapsed from the time of the testator's death, any further accumulation of his real and personal estate, in conformity with the directions in his will to that effect, became void under the provisions of the Thellusson act; but, under the decree in the original cause, the rents, dividends, and interest continued, as before, to be paid into court, and accumulated during the life of Elizabeth Eyre, who had then become the last and sole survivor of the testator's children. In the month of March, 1829, the original and supplemental causes were heard upon further directions; and by the order then made, a variety of additional inquiries were directed with respect to the then state of the testator's property, and the numbers and respective ages of his descendants. Elizabeth Eyre died on the 9th of April, 1834.

In the month of January, 1836, Mary Ann Smith filed a bill of revivor and supplement against all the other parties then claiming interest in the estate, partly for the purpose of prosecuting the former decree, and partly also to assert her title, as heiress at law and one of the next of kin of the testator, to such part of the trust funds as had arisen from accumulations of rents, dividends and interest, made subsequently to the 19th of October, 1825, when the period of legal accumulation expired; and praying with that view, a severance and apportionment of the funds in court, between the parties entitled as residuary legatees, on the one hand, and herself and the other parties entitled as heiress at law and next of kin, respectively, on the other. [\*235]

Under a decretal order made in all the before mentioned causes, and dated the 21st of April, 1837, the master made a report on the 28th of March, 1838; and thereby, among other things, found and stated the amount of the fund in court on the 19th of October, 1825; and also the amount which had been subsequently added thereto by the accumulation of the rents, dividends and interest, up to the date of his report, and distinguished how much of the last mentioned accumulation consisted of the produce of the real, and how much consisted of the produce of the personal, estate. He further found that in the year 1823, pursuant to an order made in the original cause and the first supplemental cause, the costs of those causes, to the amount of 614*l.* 18*s.*, were raised and paid out of the fund then in court. He further found that, of the ten grandchildren who were living at the testator's decease, five, namely,

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Benjamin Wildsmith, the younger, Catherine Wildsmith, Joseph Wildsmith, the younger, Elizabeth Ramsay, and Mary Ann Cosins, had subsequently died in the lifetime of Elizabeth Eyre: that two of these, namely, Benjamin Wildsmith, the younger, and Joseph Wildsmith, the younger, left children who were living at the death of Elizabeth Eyre: that of the other three, Catherine Wildsmith died without having been married, and that Mary Ann Cosins and Elizabeth Ramsay both left issue; but that all such issue died in the lifetime of Elizabeth Eyre.

[\*236] \*The causes having again come on for further directions upon this report, several questions were raised and decided upon the construction of the testator's will, and the operation of the Thellusson act, (39 & 40 G. 3, c. 98,) in reference to it.(a)

One of those questions was, whether the surviving children of such of the testator's grandchildren as had died in the lifetime of Elizabeth Eyre, were entitled to the respective original shares of their deceased parents only, or whether they were not also entitled to the shares which were given over to those parents, on the death of the three grandchildren who died without issue living at the death of Elizabeth Eyre. The Master of the Rolls determined that the gift over, to the issue of the deceased grandchildren, applied to the accruing as well as to the original shares.

Another question was, out of what fund the costs of the suit ought to be paid. The Master of the Rolls, by his order on further directions, directed that the sum of 614*l.* 18*s.*, already paid out of the fund in court for costs, together with the further sum of 1731*l.* 14*s.* 6*d.*, being the amount of costs taxed and included in the master's report of March, 1838, should be apportioned between, and charged rateably upon, the fund belonging to the heiress at law, and the fund belonging to the next of kin, those funds being the accumulations which had accrued upon the trust estate subsequently to the 19th of October, 1825; and that the subsequent taxed costs of all the parties should, in like manner, be apportioned between, and paid out of the same funds.

[\*237] \*Mary Ann Smith, who was one of the five grandchildren who survived Elizabeth Eyre, and who was also the testator's heiress at law and one of his next of kin, appealed against his Lordship's decision upon those two points. The petition of appeal submitted that the three shares which Catherine Wildsmith, Elizabeth Ramsay, and Mary Ann Cosins, or their respective issue, would have been entitled to had they been living at the death of Elizabeth Eyre, had become, in the events which had happened, divisible among the grandchildren living at the period of the distribution of the funds; and that the issue of such of the testator's grandchildren as were then dead were not entitled to participate in such three shares.

(a) See the report of the case at the Rolls, 2 Keen, 564, where the will and the facts of the case are stated more at large.

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The petition further submitted that the dividends and accumulations of dividends of so much of the funds in court, as accrued subsequently to the 19th of October, 1825, and as arose from the sale of the testator's real estate, and also the dividends and accumulations of so much of the funds aforesaid as arose from the testator's personal estate, ought to have been exonerated from the payment of the costs of the suits; or otherwise that such costs ought to have been apportioned and paid *pro rata*, out of the before mentioned dividends and accumulations of dividends arising from the real and personal estate, and the funds standing to the credit of the causes on the 19th of October, 1825, generally.

Mr. *Treslove* and Mr. *Tillotson*, in support of the appeal.

Mr. *Spence*, Mr. *Temple*, Mr. *Bichner*, Mr. *Anderdon*, Mr. *Wakefield*, Mr. *Wigram*, Mr. *Richards*, Mr. *Kenyon Parker*, Mr. *Rodgers* and Mr. *Willcock*, for different parties interested in supporting the decree.

\*Upon the first point no cases were cited in addition to those which [\*238] were referred to upon the argument in the court below.

Upon the second point, Mr. *Treslove* referred to *Ackroyd v. Smithson*,<sup>(a)</sup> *Brown v. Bigg*,<sup>(b)</sup> and *Roberts v. Walker*.<sup>(c)</sup>

On the other side it was argued, that the question was entirely new, and that, by ordering the costs to be paid out of a fund which, in the event, remained undisposed of by the will, the court was only more fully carrying out the true intent and wish of the testator, who must certainly be presumed to have had greater favor for residuary legatees, who were express objects of his bounty, than for those who might answer the description of his heir at law and next of kin at a remote period, persons of whom he could know nothing, and whose only claim was under an intestacy. It was further contended that, independently of the general question, the particular language of this will, specially providing for payment of the costs and charges attending the execution of the will, out of the estate, must of course include the costs of any suit for the administration of it, and therefore fully justified the present order. Reference was made to the cases of *Bagshaw v. Newton*,<sup>(d)</sup> *Skrymsher v. Northcote*,<sup>(e)</sup> and *Howse v. Chapman*.<sup>(g)</sup>

1839 : Jan. 16.—THE LORD CHANCELLOR :—Each grandchild living at the testator's death had, for himself or his children, a vested interest in his own \*share, subject to be divested in the event of his dying [\*239] without leaving any child before the death of the surviving annuitant: and he had also a contingent interest in the share of any other of the grandchildren who might die without issue before the death of the surviving annuitant. And the question is, whether this contingent interest was to depend upon the further contingency of himself surviving such other grandchildren; that is, whether the fact of his predeceasing such other grand-

(a) 1 Bro. C. C. 503; 2 Dick. 566. Reg. Lib. A. 1779, fol. 668.

(b) 7 Ves. 279. Reg. Lib. A. 1801, fol. 794.

(d) 9 Mod. 283.

(e) 1 Swan. 566.

(c) Russ. & Mylne, 752.

(g) 4 Ves. 452.



1839 —Eyre v. Marsden.

children was intended to deprive his children of that benefit to which he would himself have been entitled had he survived; or, in other words, whether his children who, in the event of his death before the death of the surviving annuitant, were to stand in his place, were to do so as to his original share only, and not as to the accruing share.

I am of opinion that the children are to stand in the place of the parent as to both the original and accruing shares. The direction is, that in case any of his grandchildren "shall die before his, her, or their share or shares of his estate and effects shall become payable, leaving lawful issue, then such issue shall be entitled to the share or shares which his, her, or their deceased parent or parents would have been entitled to if then living." This description is amply sufficient to include the shares in question. These accruing shares are given "unto and equally amongst my surviving grandchildren, to be paid at the same time, and in the same manner, as before mentioned touching the original share or shares of my said grandchildren."

If it were necessary to consider the word "surviving" as meaning "living at the time of the accruer taking place," there would be much difficulty [\*240] in the construction contended for by the respondents. But it is not necessary to give it that meaning. The word "surviving" has been construed "other," to give effect to the apparent intention. Lord Eldon so lays down the rule in *Wilmot v. Wilmot*.<sup>(a)</sup> If "surviving" were to be construed "living at the time when the accruer takes place," the grandchildren then living would take absolute interest, unless the words "in the same manner as before mentioned touching the original shares" introduce into this gift the provision for the children, and the gift over upon death without children; and if it do so, why is it not also to introduce into this gift the provision for children in the event of their parent's death before the happening of the accruer? If this construction be not adopted, upon the death of all the grandchildren but one, during the life of the surviving annuitant, the share of that one, afterwards dying in the lifetime of the annuitant, would be undisposed of, although all the other grandchildren might have left children.

I think the intention sufficiently expressed, and there is ample authority for construing the words so as to give effect to such intention. I therefore think the judgment of the Master of the Rolls right upon this point.

Upon the question of costs, which, under the circumstances, is, I think, a proper subject of appeal,<sup>(b)</sup> the first consideration is, whether the testator has, by his will, given any directions applicable to the costs. For the respondents it was contended, that he has, by his will, given directions conformable to the provisions of the decree. I do not find, however, from the notes [\*241] of the Master of the Rolls' judgment, that he founded his decision upon any such directions; but he appears to have proceeded upon what he considered to be the clear rule of the court.

(a) 8 Ves. 10. (b) See *Taylor v. Southgate*, p. 203, *supra*. [*Angell v. Davis*, p. 360, *infra*.]



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1839.—Eyre v. Marsden.

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It is, however, expedient to see what the testator has directed upon this subject. He, in the first place, directs the payment of his testamentary expenses out of his real and personal estate ; and, after having devised and bequeathed all his real and personal estate to his trustees, he declares the trust to be that they shall, at any time or times after his death, sell and convert into money all his real and personal estate, and invest the proceeds, after payment of his debts, funeral and testamentary expenses, and the costs and charges attending the execution of his will ; and then after directing the payment of the annuities to his three children, he directs that the surplus of the annual income of his estate and effects shall be applied, in accumulation of the capital of his property, for the benefit of his grandchildren ; and, after the death of the survivor of his children, the annuitants, he directs his trustees to sell and convert into money all such parts of his estate and effects as shall not consist of money, and call in the money placed out upon security as aforesaid, and divide the same, after deducting the expenses of performing that his will, and the legacies thereafter mentioned, amongst his grandchildren.

These directions, it was contended, authorized the payment of the costs out of that part of the income of the property which has been decided to belong to the heir at law and next of kin. The first direction is to pay out of the *corpus* of the estate, contemplating a sale soon after the testator's death. The second directs the same fund to be applied ; but, contemplating a sale at a later period, it includes the accumulations under the "description of " money placed [\*242] out upon security as aforesaid ;" for, although there is no actual direction to invest the accumulations, that may be implied from the direction to apply the surplus income in the accumulation of capital. But the " money so placed out upon security as aforesaid," if intended to include the accumulations, must be confined to moneys which could and ought to be so placed out upon security for the purpose of accumulation, which would exclude the fund in question. The expenses are directed to be paid out of the fund bequeathed to the grandchildren. The fund to be divided among the grandchildren is the fund so realized after payment of the expenses ; whereas the income, decided to belong to the heir and to the next of kin, ought not to have constituted part of that fund, or to have remained in the hands of the trustees. If the heir at law and next of kin had been apprised of their rights, they might, immediately after the expiration of the twenty-one years, have claimed that income as it arose. The testator, although he could not effectually direct an accumulation beyond the twenty-one years, might undoubtedly have directed payment of those expenses out of the property after that period : but, so far from doing so, he appears to have done precisely the reverse. The payment he has directed is, either out of the *corpus* of his property, or out of so much of the accumulated income as the trustees might have invested for the purposes of his will ; and the income in question is what they had no right so to invest. If, therefore, the directions in the will as to the expenses are to regulate the direction of the court as to the payment of the costs of

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 1839.—Eyre v. Marsden.
 

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the suit, it appears to me that they would protect the fund in question from such payment, rather than subject it to it.

Supposing those directions in the will, however, not to be sufficient [\*243] to regulate the payment of the costs of \*these causes, what, then, are the rule and practice of the court, independently of any direction in the will? It has been assumed to be a clear and settled rule, where a suit has become necessary, and the costs are therefore to be paid out of some part of the estate, that the costs should be defrayed in such a manner as not to disappoint the legal directions of the testator, but that they are to be paid out of the fund which the testator has not disposed of. This supposed rule being so general as to regulate, if well founded, the practice of the court, requires to be strictly examined. I do not find that the point was regularly argued at the Rolls, or that any authorities upon it were cited on either side.

The rule so enunciated, with reference to the facts of this case, must be considered as laying down the proposition that any part of the personal estate, unaffected, for any reason, by the dispositions of the will, is to be applied in payment of the costs of a suit for the administration of the estate, in preference to, and therefore in exoneration of, those parts of the personal estate, which are affected by such dispositions. Cases, therefore, in which it has been said that such costs are to be paid out of a residue undisposed of will not support the rule so enunciated. In those cases, the fund applied, being residue, will be found to be the most material, if not the only essential, part of the proposition.

To say that costs, and all other charges upon the estate, are to be paid out of the residue, is doing little more than expounding the meaning of the term "residue;" for that only can be residue which remains after discharging all legal and testamentary claims upon the estate. Strictly speaking, the payment is not made out of the residue, but the residue is less than it otherwise would be by the amount of such payments; and whether [\*244] \*such residue be disposed of by the will, or not, does not seem in reason, or upon authority, to make any difference.

In *Howse v. Chapman*,<sup>(a)</sup> the leading case referred to in support of the proposition under consideration, all the bequests in favor of the city of Bath were held to be specific, some of which were void under the statute of mortmain; and there being no residuary gift, certain property, not specifically given, was residue undisposed of, while other parts of the personalty bequeathed to the city of Bath, but within the statute of mortmain, was personalty undisposed of, but not residue undisposed of. The decree strongly exemplifies the distinction; for the costs and debts were paid first out of the residue undisposed of, and what should not be so paid was directed to be paid out of the property well given to the city of Bath, and the property

(a) 4 Ves. 542.

1839.—Eyre v. Marsden.

intended to be so given, but which had been held to be undisposed of, *pro rata*.

In *Barton v. Cooke*,<sup>(a)</sup> there was a residuary gift, but no residue ; an abatement amongst the pecuniary legatees having become necessary, the costs were ordered to be paid out of the personal estate not specifically disposed of. *Nisbett v. Murray*<sup>(b)</sup> was the same : all the bequests were held to be specific : there was no gift of the general residue ; and the costs were ordered to be paid out of the residue undisposed of, that is, out of the residue which happened, in that case, to be undisposed of.

Two classes of cases occur in which part of the personal property is undisposed of by the happening of \*facts, or the interposition of law, [\*245] such as, first, cases in which, by the death of a legatee, tenant in common of the residue, his share has lapsed ; and, secondly, cases in which gifts of personalty to charities are void under the mortmain act.

*Ackroyd v. Smithson*<sup>(c)</sup> is an instance of the first class. The printed report is silent as to the costs ; but it was stated at the bar, in the course of the argument upon the present appeal, that the registrar's book shows that the costs were paid, *pro rata*, out of the shares of the residue which the legatees took, and those shares which had lapsed. In *Roberts v. Walker*<sup>(d)</sup> parts of the personal estate were undisposed of, in consequence of lapse ; but the costs appear to have been paid out of the general fund. The same rule applies where the intestacy as to part does not arise from lapse, but from a revocation of a bequest, as in *Creswell v. Cheslyn*,<sup>(e)</sup> as explained in the note to *Skrymsher v. Northcote* ;<sup>(g)</sup> and in the latter case itself, in which the question was raised that the costs ought to be paid out of the part undisposed of, and not out of the general estate, Sir Thomas Plumer decided that the costs should be apportioned.

In cases in which part of the property given to a charity becomes undisposed of from being within the mortmain act, it has been long settled that the costs are paid, *pro rata*, out of the part so undisposed of, and the property well bequeathed to the charity. Such were the cases of *The Attorney General v. Lord Winchelsea*,<sup>(h)</sup> and *The Attorney General v. Hurst*.<sup>(i)</sup>

These cases seem to negative the proposition contended for by the respondents, and to establish, on the \*contrary, that, where an intestacy, as to part of the personal estate, arises from the intention of the testator being defeated by the happening of some event or the operation of law, the part so falling to the next of kin shall, in his hands, be subject to the same liability as to costs, and to no more than it would have been subject to if the gift had taken effect. And, if that be so in other cases, why should it not be so in cases of partial intestacy arising from the operation of the act against accumulation ? Why should a rule as to costs be adopted in cases

(a) 5 Ves. 461.

(d) 1 Russ. & Mylne, 752.

(h) 3 Bro. C. C. 373.

(b) 5 Ves. 149.

(e) 2 Eden, 123.

(i) 2 Cox, 364.

(c) 2 Bro. C. C. 503.

(g) 1 Swan. 571.

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 1839.—*Eyre v. Marnden*.
 

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within the 39 & 40 G. 3, c. 98, different from that which has been adopted in cases within the 9 G. 2, c. 36 ? By the latter statute dispositions inconsistent with its provisions are declared to be absolutely, and to all intents and purposes, null and void.<sup>(a)</sup> By the former, directions for prohibited accumulations are declared to be null and void ; and it is enacted that the rents, issues, profits and produce of such property, so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of that act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed.

The case of the heir at law and next of kin, under the act against accumulations, appears to me not only to be as good, but much stronger than under the mortmain act. Under the latter the title rests altogether upon the right to property undisposed of ; but the act against accumulations gives a statutable title. If this had not been intended, it would have been sufficient to declare the direction for the prohibited accumulation void. What, however, is the effect of this decree ? To take from the heir and next of kin that [\*247] which the statute gives to them, and to apply it for the purposes \*prohibited by the act—for it operates to increase the accumulation out of funds accrued beyond the permitted period, in exoneration of a charge to which the fund accumulated within the permitted period would otherwise have been liable.

Considering the case, therefore, without reference to the particular circumstances, I am of opinion that the fund in question ought not to be made subject to the costs of the suit ; and having regard to the particular circumstances, the case appears to me to be particularly unfavorable to the application of the rule contended for, if any such existed.

The testator died in the month of October, 1804 ; and, in the year 1812, the bill was filed to have the accounts taken, and administration of the property under the will. The fund in question, therefore, did not commence to arise until October, 1825 ; but in the year 1823, 614*l.* 18*s.* of costs were paid out of the funds then in court ; and yet this sum is, by the decree, ordered to be repaid, and a further sum of 1731*l.* 14*s.* 6*d.*, costs taxed in 1838, and all the subsequent costs, being the whole of the costs of the suit, are ordered to be paid out of the funds of the heir at law and next of kin. The title of heir and next of kin commenced in October, 1825 ; and if they had, at that time, claimed the income of the property, no effectual resistance could have been made to their claim. It was by accident and wrong that the subsequent income has accumulated, and is now in court ; and if right had been done in 1825, no question could have arisen as to payment of the costs of the suit out of the funds of the heir and next of kin.

It appears that no part of the proceedings in these causes, anterior [\*248] to the decretal order of the 21st of \*April, 1837, had any reference to

(a) See sect. 3.

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 1838.—Frewin v. Lewis.
 

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the question of the accumulation, as directed, exceeding the permitted period ; but, from that time, it has formed part of the proceedings, and has therefore occasioned part of the expense ; and this has arisen from the neglect of the heir and next of kin in having permitted their funds from October, 1825, to be mixed up with the other funds.

It appears to me, therefore, that the correct mode of providing for the costs will be to discharge the order so far as it relates to the 614*l.* 18*s.* costs, that sum having been properly paid out of the fund in court in 1823, and to vary the order, so far as it relates to the costs, by directing that the sum of 1731*l.* 14*s.* 6*d.*, and all the subsequent costs of the suit, except so much as have arisen from the separation of the funds of the heir at law and next of kin, subsequently to the order of the 21st of April, 1837, and the inquiries and proceedings incident thereto, be paid out of the general estate of the testator, including the fund accumulated within the permitted period ; and that it be referred to the master to ascertain how much of the costs, since the order of the 21st of April, 1837, have arisen from such separation of the funds of the heir and next of kin, and the inquiries and proceedings incident thereto ; and that he apportion such costs *pro rata* between the funds of the heir and next of kin, and that the same be paid thereout accordingly.[1]

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 \*FREWIN v. LEWIS.

[\*249]

1838: January 20, 22, 27.

Principles of the court's jurisdiction over public functionaries.

THE plaintiffs were two of the governors and directors of the poor of the parishes of St. Andrew, Holborn, above the Bars, and St. George the Martyr, appointed under a local act of parliament, (6 G. 4, c. clxxv,) for regulating the relief and maintenance of the poor within those united parishes. The defendants were the poor law commissioners for England and Wales, and the persons who filled the office of guardians of the Holborn Union. The Holborn Union was formed by virtue of an order of the poor law commissioners, dated the 29th of March, 1836 ; and it comprised the united parishes of St. Andrew, Holborn, above the Bars, and St. George the Martyr, together with the liberty of Saffron Hill and certain other extra-parochial districts. The bill alleged, among other things, that the order of the 29th of March, 1836, was not made with the consent in writing of the governors and directors acting under the 6 G. 4, c. clxxv.

Two demurrers were filed to the bill ; one by the poor law commissioners, and the other by the guardians of the Holborn Union. The general outline of the case made by the bill is stated in Mr. Simon's report of the case

[1] Vide *Angell v. Davis*, post, 360 ; *Johnson v. Woods*, 2 Beav. 415 ; *Appleby v. Duke*, 1 Hare, 309 ; *King v. Strong*, 9 Paige, 100 ; 2 Keen, 581, n. 1.



1833.—Frewin v. Lewis.

upon the argument of the demurrers in the court below.(a) The Vice-Chancellor having allowed the demurrers, the defendants appealed.

The *Solicitor General*, Mr. Tomlinson, Mr. Romilly, and Mr. Collins, for the demurrer of the Poor Law Commissioners.

[\*250] \*Mr. Wigram and Mr. W. T. S. Daniel, for the demurrer of the Guardians of the Union.

Mr. Knight Bruce, Mr. Jacob, and Mr. Stuart, in support of the bill.

The argument consisted chiefly of a critical commentary on the provisions of the poor law amendment act, (4 & 5 W. 4, c. 76,) considered in connection with the local act by which the management of the poor of the united parishes had been previously regulated. The defendants relied on the judgment of the Court of King's Bench in *The King v. The Poor Law Commissioners, in the Matter of the Parish of St. Pancras* ;(b) *The King v. the Poor Law Commissioners, in the Matter of the Whitechapel Union* ;(c) and the *Queen v. The Poor Law Commissioners, in the Matter of the Holborn Union* ;(d) the last of which, being a judgment at law in the identical case and upon the very question raised by the present bill, the defendants submitted was conclusive. With respect to the jurisdiction of the court over public bodies exercising their functions under powers vested in them by acts of parliament, and the principles upon which the court interferes against such functionaries for the protection of property pending the decision of questions as to the title, reference was made to *Attorney General v. Forbes* ,(e) *Ellice v. Earl Grey* ,(g) and *Marr v. Littlewood* .(h)

[\*251] \**Jan. 27.*—THE LORD CHANCELLOR:—In the course of the argument, I stated that on the principal point in this case I was clearly of opinion that the judgment of the Vice-Chancellor could not stand, according to the law as it is now understood ; the main object of the bill being to prevent the orders of the poor law commissioners from being carried into effect, on the ground that the commissioners had exceeded their jurisdiction, and that they had no right to constitute that union which they did constitute by the order of the 29th of March, 1836. That depends upon the question whether the district or the parishes over which that order was to operate had, antecedently to that order, been made a union within the meaning of the 32d section of the poor law amendment act ; in which case the consent of the governors of the then existing union would be required, to give validity to the order.

The plaintiffs filed their bill, asking for the interposition of the court, which interposition could only be asked for on the ground of the poor law commissioners having exceeded their authority. They were bound to make out such a case as the foundation of their application ; and with that view it was necessary to show that the district over which the commissioners had assumed jurisdiction, for the purpose of forming the union in question, was,

(a) 9 Sim. 66.

(b) Now reported in 6 Ad. &amp; Ell. 1.

(c) Ibid. 36.

(d) Ibid. 56.

(e) 2 Mylne &amp; Craig, 123.

(g) 6 Sim. 214.

(h) 2 Mylne & Craig, 454 ; and see *Salmon v. Randall*, 3 ibid. 439.



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1838.—Frewin v. Lewis.

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by the poor law amendment act, excluded from their jurisdiction under the particular circumstances of the case. The only allegation of fact made for that purpose consisted of a reference to the local act, which was passed for the purpose of regulating the relief of the poor within the particular district. That reference has clearly let in the whole of the provisions of the local act. But when the act itself is looked at, so far from establishing the facts for which \*reference was made to it, and which were necessary to be [\*252] established to show that the poor law commissioners had no power, in my opinion it proves directly the reverse.

Such would have been my opinion if I had not the benefit of the decision of the Court of Queen's Bench upon the point: but at this moment, when I am called upon to say whether the plaintiffs have or have not stated a case entitling them to the interference of the court, and whether they have or not stated a case showing that the poor law commissioners have exceeded their authority, I have the opinion of the Court of Queen's Bench<sup>(a)</sup> that the commissioners have not exceeded, but have kept within their jurisdiction, and have only done that which by the act of parliament they were entitled to do.

That the Vice-Chancellor had not the benefit of that decision is perfectly true; and it may very well explain how his honor came to a different conclusion. But now, upon re-hearing the case, I am bound to pronounce my judgment according to the law as I find it, with the additional assistance to be derived from the judgment of the Court of Queen's Bench; and if I were to overrule these demurrers, because there was doubt upon the law at the time when they were argued before the Vice-Chancellor, I should be asserting that in point of law which I know to be not correct. It is quite clear that I am bound to decide according to the law as I now find it established, and therefore I am bound to reverse the orders of the Vice-Chancellor.

\*Assuming that to be so, another question was raised, namely, [\*253] taking it for granted that the order of the poor law commissioners was correct, that is to say, that they had a right to constitute that union, whether, under the provisions of the poor law amendment act, they had or not jurisdiction over the workhouse in question, it being a workhouse used for the purposes, and existing within the limits of one of the districts constituting the union according to the act. That question partly turns upon the particular expressions used in the clause giving the poor law commissioners the right of control after a union has been constituted, and of dealing with the workhouse in one district for the benefit of the whole district; and partly also on the language of the various provisions to be found in different parts of the poor law amendment act.

The sections to which I think it necessary to refer, and which I have accurately examined, put it beyond all doubt that the commissioners possess

(a) *The Queen v. The Poor Law Commissioners, in the Matter of the Holborn Union*, now reported in 6 Ad. & Ell. 56.

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1838.—Frewin v. Lewis.

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the power which they have here exercised. For this purpose I assume, what I have before stated as my opinion, not only from looking into the act, but from the assistance I have derived from the Court of Queen's Bench, that they had a right to constitute a union of this district. The 21st section of the act declares, that all powers and authorities given by every other act, general as well as local, relating to the building, altering, or enlarging of poor-houses and workhouses, and to borrowing money for those purposes, are to be exercised under the control of the poor law commissioners. By the 23d section, the commissioners are empowered, with the consent of a majority of the guardians of any union, to build, hire, or alter or enlarge the workhouse, and to levy or raise any sum or sums for that purpose: and by the 24th section it is enacted, that the amount of such sums to [\*254] be raised shall not exceed the average annual amount of the rates raised for the relief of the poor in such parish or union for three years. Then the 109th section, which is the interpretation clause, states that the word "union" shall be construed to include any number of parishes constituted under that act; and the 26th section authorizes the commissioners to form unions, "and thereupon the workhouse or workhouses of such parishes shall be for their common use." The 28th section authorizes the commissioners to ascertain the average expenditure for the poor of each parish for three years preceding the union; and each parish is to contribute to the expense of altering the workhouses in the proportion of the annual average expenditure of the parish; and it directs that the parishes are to be assessed to a common fund for that purpose. The 38th section provides, that in case of the appointment of a board of guardians for a union, the workhouse of the union shall be governed by such board of guardians.

Being of this opinion, and finding that upon the clauses of the act of parliament there is no manner of doubt or ambiguity, it is clear that the guardians of the union have the power of doing that which the commissioners in the first instance had the power of doing, and that which they have commenced doing.

The question of jurisdiction was raised, and it was argued by those who supported the demurrers that this court had no jurisdiction. Now, I apprehend that the limits within which this court interferes with the acts of a body of public functionaries, constituted like the poor law commissioners, are perfectly clear and unambiguous. So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to [\*255] them by the law, this court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under the authority of their commission, but treats them,

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1838.—Frewin v. Lewis.

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whether they be a corporation or individuals, merely as persons dealing with property without legal authority.

That distinction, which is very obvious, sufficiently explains all the grounds on which this court ever interferes with the acts of bodies constituted as these commissioners are. Many cases have come judicially before me, in which I have been called upon to act upon this principle; more especially in the instance of railway companies, canal companies, and other bodies incorporated by acts of parliament, as to which, while the court avoids interfering with that which they do while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; and if, under pretence of an authority which the law does give them to a certain extent, they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction.

The present bill, however, does not state any such case; it merely states that it is inconvenient that these alterations should take place, and that the proposed expenditures should be made; and the reason why it is alleged to be inconvenient is, that, in the district over which the plaintiffs under the local act have an authority, the workhouse is sufficient for the purposes of that district, and that the other district, Saffron Hill, has a workhouse of its own, which is also sufficient for its \*purposes. That is no rea- [\*256] son at all: on the contrary, it is exactly the case for which the statute intended to provide, that, instead of each district having a separate workhouse, they should all have their workhouse in common. If it had been necessary, and the court had a right to inquire whether the poor law commissioners were exercising a sound discretion, I do not find alleged on the face of this bill that which would give the court a controlling power over their acts. That, however, is not the ground on which I proceed, because the act which the poor law commissioners have done is clearly within their authority; and under these circumstances, I apprehend, this court has no jurisdiction to exercise any power over their proceedings; although it would be otherwise if they had exceeded their authority.[1]

Upon the ground of want of equity, I think the demurrers must be allowed.

THE LORD CHANCELLOR at the same time made an order dissolving the injunction which the Vice-Chancellor had granted upon overruling the demurrers.

[1] Vide *The Attorney General v. The Corporation of Poole*, ante, 30; 9 Sim. 91, n. 1; 2 Myl. & Cr. 133, n. 1; 3 Myl. & Cr. 452, n. 1.

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 1839.—Lloyd v. Wait.
 

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\*LLOYD v. WAIT.

1839: May 22.

After the six weeks limited by the 13th order of 1828, as amended in 1831 have expired, the master has no jurisdiction to entertain applications for leave to amend.

ON the 11th of February, 1839, after a full answer had been put in, the plaintiff amended his bill, without requiring any further answer. On the 26th of March following, the six weeks time for obtaining leave to amend, under the 13th order of 1828, as amended in 1831, expired; and on the 9th of April, the defendant was in a condition to have had the bill dismissed for want of prosecution.

On the 22d of April, the defendant gave notice of a motion for the 25th, that the bill might be dismissed accordingly. On the 16th, 20th, and 23d of April, the plaintiff made three several applications to the master for leave to amend, all of which were refused.

The plaintiff on the 1st of May, gave notice of a motion for the 8th, for leave to amend his bill, by way of appeal from the decision of the master; and that motion and the defendant's motion for the dismissal of the plaintiff's bill having come on together, his honor made an order granting the plaintiff leave to amend, and refused the motion of the defendant.

The defendant now renewed his motion before the Lord Chancellor, that the bill might be dismissed, and at the same time moved that the order of the Vice-Chancellor, giving leave to the plaintiff to amend his bill, might be discharged.

[\*258] Mr. *Roupell*, for the motion.—\*The plaintiff's proceedings before the master in the month of April, with a view to obtain leave to amend the bill, were *coram non judice*, and wholly irregular; for after the six weeks' time limited by the 13th order the master had no jurisdiction to entertain any such application, and those proceedings can therefore interpose no bar to the success of the defendant's motion; *Smith v. Webster*.<sup>(a)</sup> This furnishes a conclusive answer to any argument that might be urged against the present application, on the ground of its being an appeal from an order which the statute<sup>(b)</sup> has declared to be final; for if the decision in *Smith v. Webster*, be correct, the order of the Vice-Chancellor must have been made in the exercise, not of the appellate jurisdiction given by the statute, but of the ordinary and original jurisdiction of the court. It has been suggested that *Smith v. Webster* was meant only to apply to a case of exceptions; but the principle there laid down is quite general; and the Vice-Chancellor, who afterwards took a different view in *Milbanke v. Stevens*,<sup>(c)</sup> could not have been then aware of your Lordship's decision.

Mr. *Wakefield* and Mr. *Shebbeare*, contra.—The language of the act of

(a) 3 Mylne &amp; Craig, 244.

(b) 3 &amp; 4 W. 4, c. 94, s. 13.

(c) 8 Sim. 160.

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 1839.—Lloyd v. Wait.
 

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parliament seems to favor the construction which, in *Milbanke v. Stevens*, the Vice-Chancellor has put upon the 13th of the new orders; and, having regard to the object with which that order was framed, that would seem to be the more convenient and reasonable construction. *Milbanke v. Stevens*, besides, according to the report of the case, has the sanction of your Lordship's opinion in its favor; and the rule there laid down has, in consequence been generally acted upon and followed in the masters' offices; so \*that if the plaintiff were wrong, he has been innocently mis- [\*259] led by an erroneous practice.

THE LORD CHANCELLOR:—I have no knowledge or recollection of the circumstances of the case of *Milbanke v. Stevens*: but the principle which I formerly laid down in *Smith v. Webster*, and from which I see no reason to depart, is directly applicable to the present case. In both cases the time limited by the orders of the court is past: and this 13th order is positive that no order shall be made giving leave to amend unless, it be obtained within six weeks after the answer is to be deemed sufficient. The discretionary power vested in the master does not belong to him after the expiration of the six weeks, and is only to be exercised within the limits prescribed to him by the order of the court.

The defendant has been quite regular in his application to dismiss. The plaintiff, then wishing to introduce a further amendment into his bill, endeavors to effect his object by taking an erroneous proceeding, namely, by applying to the master, who, at that time, had no jurisdiction. No doubt, he was misled by *Milbanke v. Stevens*, and the practice which is said to have been founded on the decision in that case; but I am to dispose of the question upon what I have no doubt is the true construction of the order, and in my opinion be applied to the wrong jurisdiction.

Under the circumstances, however, I think the justice of the case will be satisfied by discharging the orders which are the subject of the appeal motion; at the same time making an order (to which, probably, the defendant will not object) that the plaintiff shall have the benefit of his proposed amendments, and that the \*plaintiff pay the costs of the defendant's [\*260] application to dismiss, and file a replication, and serve *subpœnas* to rejoin, in the terms of the sixteenth order.[1]

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The order made was as follows:—"The defendant John Wait consenting that the amendments made in pursuance of the order made in this cause, dated the 8th day of May instant, shall stand as part of the plaintiff's bill, His Lordship doth order that the said order, and also the order made in this cause, dated the 8th day of May, 1838, refusing the said defendant's application to dismiss the plaintiff's bill for want of prosecution, be discharged.

[1] Vide *Becke v. Whitworth*, 3 Beav. 350. *Haddelsea v. Nevile*, 4 Beav. 28. *Strickland v. Strickland*, id. 146. A master has no authority to inquire as to the regularity or propriety of an order of the court. *Powell v. Kane*, 5 Paige, 267.

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1839.—Lloyd v. Wait.

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And it is ordered that the plaintiff do pay unto the said defendant his costs of the said application," &c. "And it is ordered that the plaintiff do file a replication, serve *subpœnas* to rejoin, and obtain and serve an order for a commission to examine witnesses, if he require such commission, within three weeks from this time, and give rules to produce witnesses and pass publication in Hilary term, 1840, and set the cause down for hearing, and serve *subpœnas* to hear judgment returnable in Easter term, 1840; or, in default thereof, that the plaintiff's bill do stand dismissed out of this court as against the said defendant with costs."



# REPORTS OF CASES

ARGUED AND DETERMINED IN

## THE HIGH COURT OF CHANCERY.

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### HARRIS v. START.

1838: August 3.

If an order for taxation of costs is obtained of course in a case in which it ought to have been obtained upon special application it will be discharged.

On the 24th of March, 1838, the plaintiffs obtained, at the Rolls, upon petition, an order of course for the taxation of the bills of costs of their solicitor. The solicitor afterwards moved, before the Master of the Rolls, that that order might be discharged, "by reason of the same being founded on untrue allegations and suggestions." Upon this motion, the Master of the Rolls, by an order of the 4th of June, 1838, discharged the order of the 24th of March, with costs.

The plaintiffs now moved that the order of the 4th of June might be discharged; but

THE LORD CHANCELLOR refused the motion with costs. His Lordship expressed himself of opinion, that the Master of the Rolls' order was right, upon the merits; but added, that whenever it should appear [\*262] that an order for taxation which ought to have been made the subject of a special application, had been, nevertheless, obtained of course, his Lordship would discharge it upon that ground, although the case might appear to be one in which it was proper that an order for taxation should be made.(a)

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### THE ATTORNEY GENERAL v. BARKER.

1838: November 23.

A relator and plaintiff cannot be heard in person.

THIS was an information and bill; the relator and plaintiff being Charles Hand.

(a) Accidental circumstances prevented an earlier report of this case. The decision, however, became very generally known immediately after it was made, and it has been acted upon by the Master of the Rolls. See *Grove v. Sansom*, 1 Beavan, 297.

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 1838.—*Grane v. Cooper.*


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The cause now coming on to be heard, the relator and plaintiff appeared in person, to argue the case.

THE LORD CHANCELLOR said he could not hear the relator in person on behalf of the Attorney General, and he could not separate the information from the bill, so as to hear him as the plaintiff in the bill.

Mr. *Boteler* and Mr. *Teed*, appeared for the defendant.

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[\*263]

\*GRANE v. COOPER.

1838: December 15.

When a defendant by his answer admits the possession of books and papers relating to the matters in question, but states that they are in constant use in his business, and necessary for that purpose; the court only orders, in the first instance, that they shall be produced to the plaintiff at the place of business at which they are stated to be in use; leaving it open to the plaintiff, if he does not obtain a satisfactory inspection of them there, to app'y to the court for further order.

In this case, the LORD CHANCELLOR said that it was now a well established rule, that if a defendant in his answer, after admitting the possession of books and papers relating to the matters in question, stated that those books and papers were in constant use in his business, and necessary for that purpose, the court would, in the first instance, give credit to that statement, and order that they should be produced to the plaintiff at the place of business at which they were in use; and that if the plaintiff did not obtain a satisfactory inspection of them there, it was open to him to come to the court for a further order.

Mr. *Cooper* and Mr. *Girdlestone*, Mr. *Jacob* and Mr. *Stinton*, were counsel in the case.[1]

[1] In a later case, in which documents were ordered to be deposited with the clerk of records and writs for inspection, *Wigram, V. C.*, said: "He had in many cases, followed the principle pointed out by the case of *Grane v. Cooper*; and frequently, upon the suggestion of the defendant, that such course would be most convenient, made orders for the production of documents at the defendant's or his solicitor's place of business; but this motion showed, that so much difficulty might arise from making the order in that form, as to render it generally the better rule, that the order should be in the common form, namely, for the production of the documents at the office of the court; in which case, any variation for the convenience of the parties might be made a matter of arrangement between them." *Prentice v. Phillips*, 2 Hare, 152. When a defendant is interrogated as to the contents of the books of a company in which he is a partner, and the question is one which he is bound to answer if he can, it is no excuse for not answering to say, that the books are in the custody of the officer of the company, and that his partners will not allow him access to them. If he has a right to inspect the documents, he is bound to enforce that right, and the court will, if necessary, give him time for that purpose. *Taylor v. Rundell*, 1 Phillips, 222. On a motion for the production of documents, the defendant was permitted to show by affidavit, that they could not be left in the office without great inconvenience; but as the ground for this indulgence was not stated by the answer, he was ordered to pay the costs. *Gardner v. Dangerfield*, 5 Beav. 389.

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1838.—Ball v. Harris.

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**\*BALL v. HARRIS.**

[\*264]

1838: November 9, 10. 1839: January 15.

A testamentary charge of real estates with the payment of debts, generally, authorizes a trustee, to whom, after imposing the charge, the testator has devised the estates upon trust for other persons, to sell or mortgage the estates charged, and exempts the purchaser or mortgagee from liability to see to the application of the purchase or mortgage money.

THE facts of this case appear in the 8th volume of Mr. Simons' reports.(a)

The testator's granddaughter now appealed from the Vice Chancellor's decree.

Mr. *Wigram* and Mr. *Walker*, for the plaintiff, in support of the decree.

Mr. *Jacob* and Mr. *Stuart*, contra.

The argument turned principally upon the propriety of the determination in the case of *Shaw v. Borrer*,(b) and upon the authorities referred to in the discussion and decision of that case; and it was urged, on the appellant's part, that, in the present instance, the charge of debts was paramount to the devise to the trustees, and was not within the scope of the trusts which they were directed to perform. The circumstances under which the mortgage was effected were also made the subject of strong observations on the part of the appellant.

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1839: January 15.—THE LORD CHANCELLOR:—'The testator in this case commences his will by directing that all his just debts, funeral and testamentary expenses, and the charges of the probate of his will, be paid. He then gives some pecuniary legacies, and an annuity to his son, and to his daughter Ann a dwelling-house for her life; as to which house, after the death of Ann, and as to all the rest, residue, and remainder of his real and personal estate, after his own death, he gave and devised the same unto and to the use of Thomas Leatham and William Harris, their heirs, &c., upon trust to permit his wife, Mary Perrey, during her life, and after her death to permit his daughter, Mary Shewell Thompson, to receive the income after payment of the son's annuity; and after the death of both, in trust for his granddaughter, the appellant, Elizabeth Ann Shewell Perry Thompson, absolutely; but if she should die under twenty-one, upon trust to sell such part as should not have been sold under the power afterwards given, and to pay the proceeds to his next of kin. There was then a power to the trustees and the survivor, with the consent of the wife and daughter, to sell the lands so devised, and to invest the proceeds or any part thereof in the purchase of other lands, and again with the like consent to sell and convey such last mentioned lands; and it was declared that the land so to be pur-

(a) 8 Sim. 485.

(b) 1 Keen, 559.

1838.—*Ball v. Harris.*

chased as aforesaid, and the purchase money of all the lands sold as aforesaid, should be upon the same uses and intents and purposes as his lands thereby devised. There was then the usual direction, that the receipts of the trustees should be sufficient discharges to a purchaser.

The two trustees, Leatham and Harris, and the testator's wife, were appointed executors and executrix. Leatham disclaimed the trusts by deed; and in 1829, Harris, with the consent of the wife and daughter, in execution of the trust, purchased certain lands, which were conveyed to him "to the several uses, upon the trusts, and for the several ends, intents, and purposes, and subject to the powers, provisoes, limitations, and \*declarations limited, expressed, and declared in and by the said will."

In 1831 Harris and Mary Perrey, the executor and executrix, borrowed of the plaintiff a sum of 600*l.*; to secure which, Harris deposited with him the title deeds of the lands so purchased; and by a memorandum signed by them and the testator's daughter, such deposit was declared to be for securing the repayment of the 600*l.* "advanced to the executor and executrix for the purpose of effecting the trusts of the will."

The object of the bill was to obtain the usual relief on behalf of an equitable incumbrancer; which the decree of the Vice-Chancellor directed.

The appeal is by the infant granddaughter of the testator, who, subject to the life estates of his widow and daughter, is entitled to the lands devised, and therefore to the purchased lands in question.

In support of the appeal, it was not disputed that the directions in the will constituted a charge of the debts upon the real estate.[1] But it was contended, first, that such a charge did not give a power to sell; secondly, that if it did, the lands purchased were not subject to it; and thirdly, that the power to sell, if it existed, did not authorize the mortgage to the plaintiff.

The affirmative of the first proposition was acted upon by the Master of the Rolls in *Shaw v. Borrer*;(a) and the real question is, was that decision right? I have carefully considered the judgment of the Master of the Rolls upon this point, and I entirely concur \*with him upon it.

The point indeed has been long established. It arose directly in *Elliot v. Merryman*;(b) and, as there laid down, has been recognized in the several cases referred to by the Master of the Rolls; to which may be added the opinions of Lord Thurlow and Lord Eldon in *Bailey v. Ekins*;(c) and *Dolton v. Hewen*;(d) for although the point in some of those cases was, whether the purchaser was bound to see to the application of the purchase money, the decision that he was not, assumes that the sale was authorized

(a) 1 Keen, 559. (b) Bernard. 78. (c) 7 Ves 319. See p. 323. (d) 6 Mad. 9.

[1] As to constituting a charge upon real estate, by construction of the will, or implication, for payment of debts, &c.; see *The President &c. of the Bank of the United States v. Beverly*, 1 Howard, 134, 149; *Fenwick v. Chapman*, 9 Peters, 461; *Peter v. Beverly*, 10 Peters, 532; *Harris v. Fly*, 7 Paige, 421; 1 Keen, 709, n. (3).

1839.—*Ball v. Harris.*

by the charge in the will of the debts upon the estate; that is, that the charge of the debts upon the estate was equivalent to a trust to sell for the payment of them.

This case, indeed, is free from the difficulty which has occurred in some others, for Harris is devisee in trust of the legal fee; and it being established that the will charges the estate with the payment of the debts, it follows that Harris, being trustee for that purpose, must have the power of executing his trust.

Such being my opinion as to the effect of the charge of the debts upon the estate, it is unnecessary to advert to the express power to sell with the approbation of the widow and daughter, both of whom are parties to the deposit of the deeds with the plaintiff; for it cannot be doubted but that the purchased lands are subject to the same trusts as the land devised;—and this disposes of the second point.

The third point is equally untenable; viz. that the right of the trustee to sell did not authorize the mortgage. So long ago as the case of *Mills v. Banks*,<sup>(a)</sup> in 1724, it seems to have been assumed as settled that “a power to sell implies a power to mortgage, which is a conditional sale;” and no case has been quoted throwing any doubt upon that proposition.<sup>[2]</sup> But this is not a mere power to sell; it is a trust to raise money out of the estate to pay debts. It would, indeed, be most injurious to the owners of estates charged if the trustee could effect the object of his trust only by selling the estate.

This view of the case makes it unnecessary to consider the observation urged on behalf of the appellant, that three years had elapsed since the death of the testator, and that it was not alleged that the 600*l.* was wanted for the payment of debts. It was not necessary to allege what it was not necessary to prove; and the consequence of holding that the trustee was, by the will, authorized to sell to pay debts, is, that the purchaser was not bound to see to the application of the purchase money.<sup>[3]</sup>

It was urged that as the late act of 3 & 4 W. 4, c. 104, subjected freehold lands to the payment of all debts, the effect of the decree, if supported would be to make all estates, whether settled or not, subject to sale: but it is clear that no such consequence will follow. That act makes freehold estates subject to simple contract debts, which were before subject to specialty debts; but it applies only to estates which the testator has not charged with, or devised subject to, the payment of his debts. The objection assumes that all estates liable to the payment of debts will be subject to be sold without the

(a) 3 P. W. 1. See p. 9.

[2] Vide *Haldenby v. Spafforth*, 1 Beav. 394; *Williams v. Woodard*, 2 Wend. 487; Pal. Pr. & Ag. (Am. ed.) 179, n. (n.)

[3] When, or not, a purchaser is bound to see to the due application of the purchase money, see further, *Eland v. Eland*, post, 420; *Watkins v. Check*, 2 Sim. & Stu. 199, 206, n. 1; 1 Keen, 578, n. 1.

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 1838.—Dent v. Bennett.
 

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intervention of a court of equity ; but the act expressly excludes any such result ; and the rule that a charge of debts is equivalent to a trust to sell for the payment of them leaves the distinction between estates [\*269] \*subjected to the payment of debts by the will of the debtor and estates subject to debts by the operation of law precisely as it was before the late act.

Having been led, in considering this case, to look at the printed report of my judgment in *Mirehouse v. Scafe*,<sup>(a)</sup> I am glad to take this opportunity of correcting an error in the printing in the last line of page 708 of the second volume of Messrs. Mylne & Craig's Reports, which, though only of one letter, makes the sentence express an opinion directly the reverse of what I did express. The word *now* is printed for the word *not*. Upon reading the sentence, as printed, I was certain that there must be some mistake, and upon referring to the note of my judgment I find that the word is *not*.

The appeal must be dismissed with costs.

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### DENT v. BENNETT.

1838 : November 19, 20, 21. 1839 : January 29.

Agreement obtained by a surgeon from a deceased patient set aside, upon the ground that the court was satisfied that the patient never did agree to or intend to direct what in the alleged agreement he was represented as agreeing to and directing, and that his signature, if genuine, must have been obtained by fraud, or under such circumstances as rendered it the duty of a court of equity to protect the patient and his estate from being prejudiced by it.

This relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another.

THIS was a suit to restrain the defendant from proceeding in an action at law upon a written agreement in his favor, alleged to have been entered into by Jonathan Dent, of whose will the plaintiff was the executor, and to have the alleged agreement delivered up to be cancelled.

[\*270] \*The terms of the agreement, and the statements of the defendant's answer to the original bill with respect to it, appear in Mr. Simons' report of the proceedings before the Vice-Chancellor upon the question of dissolving the common injunction upon the coming in of that answer.<sup>(b)</sup>

The bill was afterwards amended, and the defendant put in his answer to the amended bill on the 30th of May, 1836. In this answer the defendant admitted that Crowder, the person in whose presence the agreement was stated to have been signed, did not, at that time, put his name or any initials or mark on the agreement, but paid minute attention to the testator's signature, and that the defendant remained with the testator for about half an hour after he had signed the same, without having the agreement witnessed or signed by Crowder or him-

<sup>(a)</sup> 2 Mylne & Craig, 695.

<sup>(b)</sup> 7 Sim. 539.



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self; and that he took it away without having signed it, and kept it until the testator's death; and he believed the testator had no copy, the original draft having been burnt by the defendant in the testator's presence, immediately after its contents had been fairly copied for the testator's signature.

Some evidence was afterwards taken, the particulars of which will be found in the Lord Chancellor's judgment.

The cause now came on to be heard.

Mr. Knight Bruce, Mr. Bethell, and Mr. Wright, for the plaintiff.

Mr. Wigram and Mr. Stuart, for the defendant.

\*In the course of the argument the following cases were cited [\*271] and commented upon; *Villers v. Beaumont*,(a) *Bridgman v. Green*,(b) *Gibson v. Jeyes*,(c) *Harris v. Tremenheere*,(d) *Huguenin v. Basely*,(e) *Griffiths v. Robins*,(g) *Lord Selsey v. Rhoades*,(h) *Popham v. Brooke*,(i) *Earl of Winchilsea v. Garety*,(k) *Nicol v. Vaughan*,(l) *Pratt v. Barker*,(m) *Hunter v. Atkins*,(n) *Simpson v. Lord Howden*.(o)

1839; Jan. 29.—THE LORD CHANCELLOR :—The object of this bill is to have a certain agreement, alleged to have been signed by the plaintiff's testator, delivered up to be cancelled; and for an injunction against an action at law upon it. The Vice-Chancellor granted the injunction, which has not been dissolved; and the question now is, upon the pleadings and proofs in the cause, whether the plaintiff is entitled to have the agreement delivered up.

The defendant was a surgeon and apothecary, who had, in the year 1827, attended the testator, Jonathan Dent, in what is represented to have been a dangerous attack and illness. The agreement is dated the 15th of September, 1829, at which time the testator was in his eighty-sixth year; so that, according to the usual course of nature, what might remain to him of life must have been supposed to be confined to a very short \*time [\*272] from that period; yet, by the agreement, if it is to be looked at as a contract for value, the testator agrees to pay to the defendant 25,000*l.* for the medical and surgical assistance of the defendant during the remainder of the testator's life.

The testator had employed the defendant for some years before, and must, therefore, have known at what rate those medical and surgical services might be secured. The defendant's books have been produced, and show that, except upon the occasion of the illness in 1827, when the charge was about 30*l.*, the defendant's annual bills were exceedingly small; and at the date of the agreement the testator is represented as being in good health. As a con-

(a) 1 Vern. 100.

(d) 15 Ves. 34.

(h) 2 S. & S. 41.

(l) 5 Bligh. N. S. 505; and 7 Bligh N. S. 395.

(n) 3 Mylne & Keen, 113.

(b) 2 Ves. sen. 627.

(e) 14 Ves. 273.

(i) 5 Russ. 8.

(o) 3 Mylne & Craig, 97.

(c) 6 Ves. 266.

(g) 3 Mad. 191.

(k) 1 Mylne & Keen, 253.

(m) 1 Sim. 1; and 4 Russ. 507.

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tract, therefore, for value, the transaction is more extravagantly absurd than any that has come under my notice; and if the case rested upon that, would only require to be stated; and yet the defendant, in his answer, insists "that 25,000*l.* was, in fact, no more than a reasonable compensation to be paid to this defendant for the professional services stipulated for by this defendant, and for the medicines to be provided for the said testator on the part and at the expense of this defendant." It is hardly worth while to observe that the defendant, according to his own statement, took away the agreement, after the testator had signed it, without signing it himself, and that the testator never had any means in his power of enforcing the stipulation supposed to be of so much value.

The agreement, however, professes to be founded not only upon the consideration of the future services so secured, but upon the gratitude and respect of the testator to the defendant for past services, for having saved his life when in the greatest danger.

[\*273] "It has been said in many cases, particularly in *Bridgman v. Green*,<sup>(a)</sup> that this court will not suffer one to take a conveyance for consideration, and afterwards to set it up as a gift. In this case, however, both considerations are stated upon the agreement itself. Notwithstanding the ground of bargain relied upon in the answer, I consider that consideration so absolutely nominal—for I am not now considering the legality of it—that the agreement must, I think, be looked at as purely voluntary, and as a gratuitous reward for past services. In what way this court would have dealt with a voluntary and gratuitous contract for such a purpose, if there had been nothing else in the case, it is not necessary to discuss, because there are other circumstances in the case, amply sufficient to support the decree I propose to pronounce.

What is the case, independently of disputed facts? A medical attendant obtains from his patient, eighty-five years of age, an agreement to pay him 25,000*l.* for services completed two years before, the regular charge for which had been previously paid; and this, privately, without the intervention of any third person, and carefully concealed until after the death of the patient. Of such a case it may, at least, be said, in the language of Lord Eldon, in *Gibson v. Jeyes*,<sup>(b)</sup> that "those who meddle with such transactions take upon themselves the whole proof that the thing is righteous;" but so far from the defendant having succeeded in doing this, the evidence in the cause proves the reverse.

I must, however, first observe upon a provision in the agreement, strongly proving that the testator, if he ever did sign it, had nothing to do  
[\*274] with its composition \*or provisions. It is part of the agreement that the 25,000*l.* shall be paid six months after the testator's death, "independent of any will or wills the said Jonathan Dent has made or may here-

(a) 2 Ves. sen. 627.

(b) 6 Ves. 266. See p. 276.

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after make after the date hereof." The reason for getting the testator to sign an agreement instead of a testamentary paper for the same purpose is obvious. A testamentary paper, if the testator knew any thing about it, might have been purposely revoked, or, although he knew nothing about it, might be revoked by any general alteration of any will he might have made; but why insert this provision into the agreement? If the testator knew any thing about the matter, it was wholly useless; because, knowing what he had done and master of what he might afterwards do by his testamentary disposition, it was absurd to introduce this provision into the agreement. But the defendant did not know whether the testator had not left him a legacy in some existing will, and might hope that, ignorant of the contents of this agreement, he might do so in some future testamentary paper, and therefore introduced this provision for the purpose of securing to himself all that the testator might give him by will, as well as all that the agreement proposed to secure to him.

Looking at this agreement as given out of gratitude for past services, the evidence in the cause, as to which there is no question, being documentary, and applying to periods before and after the date of the agreement, appears to me conclusive to prove that the testator's mind and will were strangers to what that paper contains. It appears that in 1828, just after the services of 1827, under all the influence of that pleasure which may be supposed to arise from the enjoyment of life unexpectedly preserved, and of gratitude to the person by whom the preservation of it had been effected, the testator was so little disposed to show his gratitude to the defend- [\*27E] dant by any extraordinary remuneration, that he caused a communication to be made to him, of the 12th of November, 1828, requesting that he would not continue his visits if he proposed to charge for them; and from his own letter of March, 1828, exhibit R., it appears that he was aware that those who were then acting for the testator had paid defendant's bill, intending to conceal the amount, which was only 40*l.*, from him, the words being, "I told Mr. Dent yesterday you had settled with me, therefore you must make what charge to him you think will do." Again, in February, 1829, before the date of the agreement, the testator lent to the defendant 150*l.*, and took his own bond for it; but in 1833, having advanced to him another sum of 150*l.*, he required his bond, with three sureties, although the repayment was not to be required for three years and six months, before which time, when the testator, if he lived, would be eighty-nine, it was all but certain that the testator would be dead, and the defendant therefore entitled to the 25,000*l.* under the agreement.

These facts not only exhibit a state of the testator's mind and feelings towards the defendant wholly inconsistent with that exuberance of gratitude and generosity which could alone have rendered the alleged agreement intelligible; but they prove, which is even more important, a knowledge in the defendant that such was the state of his mind and feelings, and a dealing be-

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tween him and the testator which could not have taken place if the testator had knowingly become a party to the agreement of 1829.

There is an absence of all evidence of the testator having at any time recognized, or in any manner given any proof of approval of the agreement, [\*276] or of any \*consciousness of its existence ; but there is evidence of the defendant having, by continuing to charge the testator in his books, acted as if no such agreement existed, or was likely to be carried into effect.

But what is the defendant's own statement of the circumstances under which this agreement was made ? He says that it was settled and prepared when he was alone with the testator ; that from the time when it was signed it was in his own possession, no copy being in the possession of the testator ; and that it was carefully concealed at the testator's request, as he says, until after the testator's death. It appears that the testator was in the habit of employing Mr. Brown, his confidential solicitor, in the most minute transactions, for which purpose he passed several hours with him in one day in every week ; and what is the reason alleged for concealing this agreement from Mr. Brown ? Why, because Mr. Brown and the defendant were at variance, and because the defendant was afraid that Mr. Brown might exert his influence to his prejudice, the testator being, as it was alleged, much under his control. According, then, to the defendant's own case, the testator was a person so likely to be influenced by another in a matter of so much importance as the disposition of 25,000*l.*, that there was danger of his being induced not to give it as he had intended : but if so, was he not also liable to be induced by some means to agree to give it otherwise than he would have done if properly advised ?

It was argued, upon the authority of the civil law and of some reported cases, that medical attendants were, upon questions of this kind, within that class of persons whose acts, when dealing with their patients, ought to be watched with great jealousy. Undoubtedly they are ; but I will not [\*277] narrow the rule or run the risk of in \*any degree fettering the exercise of the beneficial jurisdiction of this court by any enumeration of the description of persons against whom it ought to be most freely exercised. "The relief,"—as Sir S. Romilly says in his celebrated reply in *Huguenin v. Buseley*,<sup>(a)</sup> (from hearing which I received so much pleasure that the recollection of it has not been diminished by the lapse of more than thirty years,)—"the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another ;" and when I find an agreement, so extravagant in its provisions, secretly obtained by a medical attendant from his patient of a very advanced age, and carefully concealed from his professional advisers and all other persons, and have it proved that the habits, views, and intentions of the testator were wholly inconsistent with those provisions, I cannot but come to the

(a) 14 Ves. 273. See pp. 285, 286.

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1839.—Dent v. Bennett.

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conclusion that the medical attendant did obtain it by some dominion exercised over his patient. How it was effected, whether by direct fraud, or by what other means, the defendant has, by the secrecy of the transaction, prevented my having any direct testimony. By that he cannot profit; the conclusion being, I think, satisfactorily established.

It was, indeed, argued that the relation of medical attendant and patient, had ceased, before the date of the agreement, by that very notice to discontinue his visits, to which I have before adverted. The relation does not cease because the patient has not medicine actually administered to him at the time, any more than the relation of attorney and client ceases because no suit may be actually in progress. If it were otherwise, I do not know that it would have made any difference; but \*I think that [\*278] the existence of the relation of medical attendant and patient is not only proved by the evidence, but by the very agreement itself.

The Vice-Chancellor has expressed a strong opinion as to the illegality of the agreement in point of law. I abstain from saying any thing upon that subject; because, if that had been the only question in the cause, I should probably have permitted the action to proceed, according to the principle upon which I acted in *Simpson v. Lord Howden*.(a) But as I am of opinion that there are grounds for the interposition of this court, quite independent of the question whether the agreement be illegal upon the face of it, and therefore void at law, that case has no application to the present.

For a similar reason, I abstain from examining the evidence as to whether the testator did or did not sign the alleged agreement; because, if the case was, in my opinion, to turn upon that, I should have left that to the decision of a jury.[1] I cannot, however, but observe upon the inconsistency between the statements in the defendant's answer and those of his only material witness, Crowder. The defendant says that a maid-servant opened the door on the 15th of September; and, after stating what passed in the presence of Crowder, says that he had set forth all that took place: but Crowder, making his deposition at a subsequent period, says that the testator himself opened the door on the 15th, and that the defendant said to him, after the agreement had been signed, that it was a 20,000 pounder. It was argued that Crowder ought to be believed in saying this, because he has declined identifying the agreement. It is, however, to be observed, that the fact to which he has declined to \*swear is capable of being disproved by living wit- [\*279] nesses, and several have given testimony for that purpose; but those two facts to which he has sworn, being stated to have passed in the presence only of the testator, who is dead, and of the defendant, no danger to himself could arise from his evidence, though it should not be true.

My judgment, however, does not proceed upon the ground that the agreement was not signed by the testator, or that it is illegal, and therefore void

(a) 3 Mylne & Craig, 97; [and see *ibid.* 109, n. 1.]

[1] When a case of this description should be sent to a jury; see *Casborne v. Wright*, 2 Beav. 76, 78, n. 1.



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 1839.—Hawkins v. Hall.
 

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upon the face of it: but upon this, that I am satisfied, from the internal evidence afforded by the document, and from other facts as to which there is no dispute, that the testator never did agree to or intend to direct, what in that paper he is represented as agreeing to and directing; and that his signature to that paper, if he ever did sign it, must have been obtained by fraud, or under such circumstances as render it the duty of a court of equity to protect the party signing it, and his estate, from being prejudiced by it.

I therefore make the decree prayed for, with costs.[2]

[\*280]

\*HAWKINS v. HALL.

1839: February 13.

A subpoena for costs cannot be served upon a party who is in custody under an irregular attachment sued out by the party serving him with such subpoena.

*Semble*, that the service would also be bad if the defendant was in irregular custody at the suit of any other person.

THE facts of this case appear in the first volume of Mr. Beavan's Reports.(a)

The defendant now moved that the Master of the Rolls' order might be discharged.

Mr. *Wakefield* and Mr. *Richards*, in support of the motion, did not dis-

(a) 1 Beavan, 73.

[2] "In *Dent v. Bennett*, 7 Simons, 539, the Vice-Chancellor, declared an agreement between a medical adviser and his patient for a large sum to be paid by the latter after his death, for past and future services, null and void. It was held, to be a glaring abuse of confidence, and the Vice-Chancellor enforced with spirit and energy the doctrine, that wherever we find the relation of employer and agent existing in situations in which, of necessity, much confidence must be placed by the employer in the agent, then the case arises for watchfulness on the part of the court, that the confidence shall not be abused." 2 Kent's Comm. (5th ed.) 483, n. a. The learned Commentator was not, of course aware, when he wrote the above, of the decision *supra*, in the same case, by the Lord Chancellor; otherwise he would have referred to it as a masterly exposition of his own doctrine. See the later case (1843) of *Gibson v. Russell*, 2 Yo. & Coll. C. C. 104, which was also the case of a medical adviser, cited 5 Russ. 11, n. 1, confirming the same general rule, but the decision of which turned so much upon numerous facts and minute circumstances, that no analysis of it was then, nor will be now, attempted. The editor however has, in his note, *ibid*, hazarded some strictures on that decision. See further, 1 Sim. 4, n. 1; 2 Sim. & Stu. 56, n. 1; 4 Russ. 507, n. 1. Age and bodily infirmity, merely, without other attending circumstances, are not sufficient to invalidate an act. Parker, C. J. in *Farnam v. Brooks*, 9 Pick. 220, states the law as follows:—"We understand the law to be, that no degree of physical or mental imbecility, which leaves the party legal competency to act, is of itself sufficient to avoid a contract or settlement with him; but if advantage is taken of his weakness to draw from him a contract or settlement which is unfavorable, by misrepresentation, imposition, or undue influence, such contract or settlement cannot be upheld in a court of equity." So, McCoun, V. C. says; "A man may exhibit weakness and folly in entering into a contract, and in disposing of his property:—He may bind himself perfectly, (where fraud is not practised upon him,) although he be a man without great abilities, if he have sufficient ability to keep himself above the reach of a commission of lunacy." *Siemon v. Wilson*, 3 Edw. Ch. Rep. 39.



1839.—*Hawkins v. Hall*.

pute the decision of the Master of the Rolls, as to the irregularity of the service of a subpoena for costs, out of the jurisdiction of the court; but they contended that there was no authority or principle which justified a decision that service of a subpoena for costs upon a party in custody was irregular, and that it was every day's practice to serve a subpoena for costs upon a person in the custody of the common law.

**THE LORD CHANCELLOR:**—The objection here is, that the party was in illegal custody, and that the author of the illegal custody was taking advantage of it.

Mr. *Purvis*, contra, cited Archbold's Practice, K. B. p. 77, and Reg. Mich. term, 15 Car. 2, sect. 2, *Wells v. Gurney*,<sup>(a)</sup> *Webb v. Dorwell*,<sup>(b)</sup> Reg. E. T. 32, G. 2, 1759, 1 Bott's Crown Office and Sessions Practice, 426, *Rex v. Blake*.<sup>(c)</sup>

\*Mr. *Wakefield*, in reply.

[\*281]

**THE LORD CHANCELLOR:**—I am called upon to decide this case in the absence of any authority applicable to it on either side; and if I had any expectation of finding such authority, I would postpone my decision. At present, however, I think the case is very clear. I think this attachment is bad upon general principle, and with reference to the practice of this court. The general principle is, that the author of wrong, who has put a person in a position in which he had no right to put him, shall not take advantage of that illegal act; and the court would not allow a party to take advantage of that illegal act even although he were not himself the author of it.[1]

It being admitted, in the present case, that the custody was an illegal custody, of which the party who made the demand was himself the author, it is no answer to that to say that you may serve the subpoena for costs upon a person in a particular custody. That means a custody in which he is not improperly placed; and further, it is not a custody in which he is placed by the party himself. I therefore think this is an attempt to take advantage of a man's own wrong; and that, if it were allowed to succeed, it would lead to great irregularity and injustice.

Upon the other ground, namely, the practice of this court, I am also of opinion that this attachment cannot stand. The practice of this court does not permit an attachment to issue upon a mere order to pay. There must be an intermediate proceeding, for the purpose of giving the party an opportunity of complying with the order; and the court therefore requires that he "should be served with a subpoena, and that a demand should [\*282] be made upon him; for it is obvious that he may have the means of payment. Now I cannot think that the order can have been executed in a proper mode, if the party obtaining it has prevented the other party from having the means of complying with it.

(a) 8 B. & C. 769.

(b) Barnes, 400.

(c) 4 B. & Ad. 353.

[1] As to the latter clause of the above sentence, see what is said by Wigram, V. C. (who doubts its authenticity,) *Woodward v. Conebeer*, 1 Hare 299; cited 1 Beav. 79, n. 1.

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 1839.—Price v. Dewhurst.
 

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If, therefore, there had been no general principle applicable to arrests in this court, and in all courts, I think there would be enough upon the practice of this court to show that this attachment must be set aside.[2]

The order for the attachment must be discharged with costs.

Mr. *Wakefield* applied that the costs which the defendant was now ordered to pay might be set off against the costs due to the plaintiff, for which the subpoena had issued, and the Lord Chancellor acceded to his application.

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PRICE v. DEWHURST.

1839 : January 31 ; February 13.

The common undertaking, upon an appeal, to pay such costs (if any) as the court shall think fit to award in respect of any proceedings had since the decree, applies only to costs incurred in the prosecution of the decree, and not to the costs of the appeal.

THE Lord Chancellor's decision in this cause, dismissing the appeal with costs, has been reported in a former part of this volume.(a)

When the petition of appeal was presented, the Lord Chancellor [\*283] made the usual order upon it, that it should \*be set down to be heard, on the petitioner, or his clerk in court, "subscribing the petition, and thereby consenting to pay such costs (if any) as the court should award in respect of any proceedings had since the decree, and upon his depositing 20*l.* with the registrar." The appellant himself resided out of the jurisdiction ; but his clerk in court subscribed, in his own name, an undertaking at the foot of the petition, in the form above stated, before the appeal was set down.

Mr. *Wigram* now moved, on behalf of the respondents, that their costs of the appeal, which had been taxed at 50*l.* 2*s.*, might be paid by the appellant's clerk in court. He referred to the 42d of Lord Lyndhurst's orders, and relied upon the terms of the order and undertaking at the foot of the petition, as being quite explicit and unequivocal, and as creating a personal liability on the party by whom the undertaking was signed ; *Pell v. Stephens*.(b) The practice of some clerks in court, who, with a view to escape this very liability, signed it in the following form,—“I consent for the appellant A. B., as his clerk in court,” though not resorted to in this instance, showed what was the understanding in the six-clerks' office.

Mr. *Sharpe*, contra :—The undertaking is not to pay the costs of the appeal, but “such costs, *if any*, as the court shall award in respect of any proceedings *had since the decree*.” It applies, therefore, in terms, to such costs only as may be incurred between the making of the decree and the hearing of the appeal, and it was intended to guard against the mischief which the party in pos- [\*284] session of and working \*the decree might sustain, from the delay of his

(a) See p. 76, *supra*.

(b) 2 Mylne & Keen, 334.

[2] Vide *Lewis v. Evans*, Cr. & Ph. 264 ; *Woodward v. Conebeer*, 1 Haro, 297.

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 1839.—Price v. Dewhurst.
 

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adversary in prosecuting an appeal. That mischief was particularly observed upon by Lord Hardwicke in *Cunyngham v. Cunyngham*,<sup>(a)</sup> and his Lordship's observations in that case probably led to the practice of requiring this, which Lord Eldon, in *Vowles v. Young*,<sup>(b)</sup> calls "the modern undertaking upon a rehearing." Mr. Vesey, in his note to the latter case, and Mr. Beames, in his collection of the orders of the court,<sup>(c)</sup> refer the practice to some general order; but no such general order can be found;—the orders which they cite relating only to the costs of appeals, and not to intermediate costs. Besides, the clerk in court, who was anciently no more than the solicitor of the party, merely signs the undertaking as an officer of the court, and as the agent and on the behalf of his client; not for the purpose of making himself personally responsible.

THE LORD CHANCELLOR said, that before determining the question, he should cause the general order to be searched for, and also direct an inquiry into the practice.

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The Registrar, Mr. Colville, subsequently informed the court that after the most diligent search no such general order as that referred to could be found. He also handed up a note, stating the course which had been followed in a number of appeals, from the time of Lord Hardwicke downwards; from which it appeared, that the undertaking in question had been first introduced about the year 1757; but that for upwards of twenty years afterwards, and even in the time of Lord \*Thurlow, the practice had been by [\*285] no means settled or uniform.

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Feb. 13.—THE LORD CHANCELLOR:—I suppose that no further information can be procured upon this subject. It turns out that there is a mistake in the note to the case of *Vowles v. Young*, there being no such general order as that which is there referred to; and it is to be observed that Lord Eldon, in his remarks in that case, refers, not to any general order, but to the practice. Now what was the mischief to be remedied by the present form of undertaking? It is very distinctly explained in *Cunyngham v. Cunyngham*. The mischief consisted in the expenses incurred in prosecuting the decree, to which, by delaying his appeal, the appellant exposed his adversary; Lord Hardwicke evidently speaking of costs over which, on a rehearing, he had no jurisdiction. Then we have the authority of Lord Eldon, in a case in which he speaks of what he calls the modern undertaking, saying that it is to meet the mischief complained of by Lord Hardwicke in *Cunyngham v. Cunyngham*. And when I look at the language of the undertaking, I think I am bound to hold that the undertaking extends and applies only to such costs as may have been incurred in the prosecution of the decree.

Motion refused with costs.

(a) Amb. 89.

(b) 9 Ves. 172.

(c) Beames' Ord. 458, 459, and 461, note.

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1839.—*Lidbetter v. Long*.

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[\*286]

\**LIDBETTER v. LONG*.

1839 ; March 27.

A bill may be demurred to, as a whole, for want of parties, if any part of the relief prayed is such as cannot be granted in the absence of a person who is not made a party to the bill.

When a demurrer for want of parties is allowed, with leave to amend, the plaintiff does not, by undertaking to amend, preclude himself from appealing against the allowance of the demurrer.

THIS was an appeal from an order of the Vice-Chancellor allowing a demurrer.

The facts of the case, as stated in the bill, were, that the defendant being the lessee of land under a covenant to build upon it, and having mortgaged it to the plaintiff before the buildings were completed, and a forfeiture having subsequently been incurred in consequence of the non-completion of the buildings within the period specified by the lease, a written agreement was made between the plaintiff, the defendant, and the lessor, by which the plaintiff, at the request of the defendant, contracted with the lessor to finish the buildings, and to pay the rent in arrear, and also to pay the growing rents during the continuance of the plaintiff's security and to give notice to the lessor of any transfer of the security; and the lessor contracted with the plaintiff to waive the forfeiture, and also, at the request of the plaintiff and with the consent of the defendant, to grant a new lease to the plaintiff for the residue of the term granted by the original lease, in case all the covenants should have been performed, in the event of the plaintiff having procured a release of the equity of redemption from the defendant, or having become the absolute owner of the leasehold premises.

The bill alleged that the plaintiff had proceeded to complete the buildings; and that in so doing, and in paying the arrears of rent, and in keeping up insurances, and otherwise maintaining his mortgage security, he had expended considerable sums of money.

[\*287] \*The prayer of the bill was, that the plaintiff might be declared to be entitled to a charge upon the mortgaged premises for the moneys expended by him in completing the buildings, and in paying the arrears of rent, and in keeping up the insurances, and the other charges before mentioned, with interest; and that an account might be taken of what was due to the plaintiff for principal and interest upon his mortgage security, and in respect of the moneys so expended; and that the defendant might be decreed to pay what should be so found due, by a day to be appointed by the court; or that, in default thereof, the defendant, and all persons claiming under him, might be foreclosed, and might deliver up all deeds and papers to the plaintiff; and that the plaintiff might be declared to be absolutely entitled to the benefit of the before mentioned agreement, and to the new lease of the premises thereby agreed to be granted to the plaintiff by the lessor, with

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1839.—*Lidbetter v. Long*.

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the consent of the defendant ; and that the defendant might be directed to join in such new lease, or in such deed or instrument as might be necessary for giving effect to the said agreement.

The defendant demurred to this bill, as a whole ; assigning, as grounds of demurrer, first, multifariousness ; and, secondly, the absence of the lessor as a party.

The Vice-Chancellor allowed the demurrer, but gave leave to amend.

Mr. *Wakefield* and Mr. *Stone*, in support of the appeal, contended that the bill was not demurrable upon either of the grounds alleged ; and, as to the second ground, they urged that the bill sought to enforce the defendant's concurrence in such lease as the lessor might grant to the plaintiff, and not to compel the lessor to grant \*such lease ; and that, at all [\*288] events, the lessor's being a party was not essential to the relief asked by the first and most material part of the prayer of the bill, namely, the foreclosure ; and that if the plaintiff should, at the hearing (as he probably would,) waive the other part of his prayer, it could not be said that the lessor's presence was essential in order to enable the court to make a decree upon the bill as it at present stood.

THE LORD CHANCELLOR said that the bill was defective for want of the lessor as a party. The bill prayed, in fact, a specific performance of an agreement to which the lessor was a party ; and although that might not be a material part of the plaintiff's case, yet it was part of the relief prayed ; and the question must be whether, upon the relief prayed, the cause could proceed in the lessor's absence.

Order affirmed, with an extension of time for amending.[1]

Mr. *Wigram* and Mr. *Heathfield* were to have supported the demurrer.

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Before the appeal, the Vice-Chancellor's order had been drawn up, containing the plaintiff's undertaking to amend within three weeks.

Mr. *Wigram* took a preliminary objection, that the plaintiff having acquiesced in the Vice-Chancellor's order by undertaking to amend his bill, could afterwards appeal.

THE LORD CHANCELLOR overruled the objection.[2]

[1] Vide, *The Attorney General v. The Corporation of Poole*, ante, 17, 32, n. 2.

[2] Vide, *Wellesley v. Wellesley*, post, 554.

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 1839.—Pickering v. Pickering.
 

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[\*289] \*Between LAKE UMFREVILLE PICKERING, Plaintiff; and EDWARD ROWLAND PICKERING, Defendant.

1839: June, 29; July, 3, 5, 10.

Where leasehold or other perishable property is included in a gift of all the testator's estate and effects to one person for life, with remainder over after his decease, the property is not to be converted into money at the testator's death, if the will contains indications of an intention that the tenant for life should enjoy the property in its existing state.

Whether a devisee in remainder of leaseholds, who is himself the executor of the testator, could, after having acquiesced for nearly thirty years in the tenant for life's receiving the rents, insist that, according to the terms of the will, the property ought to have been converted immediately after the testator's death, *quære*.

GEORGE ANDREE made his will, dated the 4th of December, 1800, in the following terms:—

“ I entreat and direct that my body be opened, or some operation performed thereon, by a surgeon, to ascertain my death. I direct that my funeral shall be without mutes, horses, and every useless show and expense. I give to my dear wife Mary 100*l*. for mourning and immediate expenses; besides which, in lieu and satisfaction of and for the provision made for her previous to and in contemplation of our marriage, and subject to and after payment of my debts, and the sums of money and legacies hereinafter given, and such annuities and insurances as I am liable to pay, I give and bequeath to my said wife all the interest, rents, dividends, annual produce and profits, use and enjoyment of all my estate and effects whatsoever, real and personal, for and during the term of her natural life. I give to my said wife all my wearing apparel whatsoever, to be disposed of at her discretion. I give to my brothers, Dr. John Andree and Charles Birbeck Andree, twenty guineas each, and to their wives five guineas each, for a ring, and to my nephew and niece ten guineas each, and to my son-in-law Lake Umfreville Pickering, [\*290] and \*my daughter-in-law Cordelia Weld Pickering, ten guineas each, not releasing the said Lake Umfreville Pickering from any sum he doth or shall owe to me. I give to my said brother John the portraits of our late father and mother. I give to Mr. Benjamin Skutt five guineas for a ring. I give to my son-in-law Edward Rowland Pickering 100 guineas and all my books (with the exception after mentioned,) and all my papers, except title deeds and securities, and I give to him absolutely all my furniture, fixtures, and things in and about my chambers at No. 8. in Staple Inn, and I give to him, his heirs and assigns, the said chambers, with the garret, cellar, and appurtenances to the same belonging, in case I shall surrender the same to him or any person as a trustee for myself. I give to my said wife, for her own absolute use and benefit, all the rest of my household furniture, wine, coals, and other stores, linen and china, and fifty volumes of my books, to be selected by herself (folios excepted,) but only the use for her life of my plate



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and pictures. I give and devise unto the said Edward Rowland Pickering, and his heirs, all manors, messuages, lands, tenements, and hereditaments which are now vested in me alone or jointly with any other person or persons as a trustee, but nevertheless upon the same trusts as are now subsisting respecting the same respectively; and I nominate and appoint my dear friends David Pike Watts, Esq., and Lawrence Gilson, Esq., and my said son-in-law Edward Rowland Pickering, executors of this my will; and I request the former two to accept each a ring of the value of ten guineas, or a piece of plate, at the discretion of my said dear wife. I direct that all the said legacies be paid and delivered as soon as my be, without any delay. And, at the decease of my said wife, I give, devise, and bequeath unto my said son-in-law Edward Rowland Pickering all the rest and residue of my estate \*and effects whatsoever, both real and personal; to hold [\*291] to him, his heirs, executors, administrators, and assigns for ever, subject as aforesaid, and to the payment of such sum and sums of money as I have undertaken or shall undertake to pay after my said wife's decease; but if the said Edward Rowland Pickering shall die in her lifetime, not having married, then I give one-half part of such rest and residue of my estate and effects, subject to the payment of one-half of such sum and sums first and last above alluded to, unto my nephew John Surel Andree and my niece Mary Ann Andree, equally to be divided between them, to hold to them or the survivor, if one only shall survive my wife, their, his, and her heirs, executors, administrators, and assigns for ever. I will that my executors shall not be answerable or accountable for the acts or defaults of each other, and that they shall be entitled to retain, deduct, and be paid their charges and expenses in the execution of the trusts of this my will. And hereby revoking all former wills by me made, I declare these presents to be my last will and testament."

The testator afterwards made a codicil in the following words:—"Being liable to pay to John Cook, of Leigh, in the county of Essex, clerk, the sum of 60*l.* a year during the term of his natural life, now I hereby expressly charge and make payable the same upon, by, and out of all lands, tenements, and hereditaments, both freehold and copyhold, which I am or shall be, or which I, my heirs or assigns, shall be entitled to, situate at or near Stevenage, in the county of Herts; and in case of the decease of John Clendon, assured by me in the Amicable Assurance Office, during the lifetime of the said John Cook, then I give unto my executors all such sums of money as shall arise and be payable by and from the said society on the decease of the said \*John Clendon, to me, my executors, administrators, or assigns, [\*292] upon trust thereout from time to time to pay and discharge to the said John Cook, during his natural life, the said sum of 60*l.* a year for his own use and benefit. Dated this 21st day of January, 1801."

The testator died on the 4th of February, 1801, and his will was proved by the defendant alone.

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 1839.—Pickering v. Pickering.
 

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The plaintiff and the defendant were sons of the testator's widow by a former husband. The testator was possessed, at the time of his death, of (amongst other particulars) a leasehold house in the Strand, for a term, of which about forty-six years were unexpired, and which house was under-let, and produced a clear annual income of 103*l.*; and he was also entitled to an annuity of 100*l.* for the life of one George Greene, who was then still living. This annuity had been granted by Greene, and secured by the covenant of William Ward, as a surety; and when the testator died, arrears amounting, as the plaintiff alleged, to 1597*l.* 5*s.* 8*d.*, and, as the defendant stated, to 1622*l.* 5*s.* 8*d.* were due. Greene was then insolvent; and Ward had died intestate, and, as it was then believed, insolvent.

It did not appear that the testator had any real estate, except an estate *pur auter vie*, the rents of which the defendant stated that the testator's widow received so long as it lasted, viz. until the year 1808.

The testator was entitled, *pur auter vie*, to the dividends of a sum of 700*l.* consols, the dividends upon which his widow received until the life dropped in the year 1808.

[\*293] \*The defendant converted into money the whole of the testator's real and personal estate, except the leasehold property in the Strand and the annuity and its arrears, and invested the produce of such conversion, after payment of debts, funeral and testamentary expenses, and legacies, in the public funds; and the dividends resulting from such investment were duly paid to Mary Andree, the testator's widow, during her life.

From the time of the testator's death until the 24th of June 1830, the widow received, with the defendant's concurrence, the rents of the house in the Strand.

In the year 1826, the defendant discovered that Ward, the surety for the payment of the annuity, had not died insolvent, as had been supposed, and that there was reason to believe he had left assets sufficient to pay the arrears; and, accordingly, the defendant in the year 1827, instituted a suit in chancery, in the names of himself and the testator's widow, against Ward's representative; and under the decree made in that suit, the defendant in the present cause obtained payment, on the 28th of August, 1830, of the sum of 4047*l.* 5*s.* 8*d.* for arrears of the annuity up to the month of June, 1825, when Greene, the grantor, had died.

After these arrears of the annuity had been recovered, the defendant represented to the widow that according to an opinion of Mr. Bell, which he had taken, it appeared that she ought not to have received the rents of the leasehold house in the Strand, but that the house should have been sold immediately after the testator's death, and that she should have received the di-

vidends which would from time to time have arisen from an investment in the funds of the produce of such sale; and \*that, with respect to the annuity, the arrears due at the testator's death ought to be considered as having been then invested in the funds, and that she was

[\*294]

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entitled to receive such a sum as would have been produced by the dividends ; and that a sum of money equal to the value of the annuity at the time of the testator's death should be considered to have been then invested in the funds, and that the widow was entitled to a sum of money equal to the dividends which would have accrued upon such investment if made. A statement of account, proceeding upon these principles, was made out by the defendant as to the leasehold house and the annuity ; and a memorandum at the foot of it, in the following words, was signed by the widow and the defendant ;—" 7th October, 1830. We do hereby declare that this account is approved by us, and that the same, as to the moneys therein referred to, contains our agreement in respect thereof, and which we do hereby confirm. Mary Andree, Edward Rowland Pickering."

The widow at the same time gave the defendant a receipt in the following form :—" Received, this 7th day of October, 1830, of Edward Rowland Pickering, Esq., the sum of 488*l.* 10*s.* 6*d.*, the balance of the account hereunto annexed, and in full for all my claims and demands for or on account of the several sums, moneys, and things therein stated, mentioned or referred to, save and except only as to the rent of the house in the Strand therein mentioned, and which I am to receive as heretofore. Mary Andree."

At this time the widow was upwards of eighty-six years of age. She died on the 17th of July, 1836, having appointed the plaintiff her executor ; and he proved her will.

\*The bill insisted that the account so settled as before mentioned [\*295] was settled and signed by the widow under the influence of misrepresentations on the part of the defendant ; and it prayed a declaration that the account was not a valid or binding settlement of accounts between them ; and that, upon the true construction of the will, the widow was entitled, during her life to receive the whole of the rent of the leasehold house, and that she was entitled to the whole of the payments of the annuity which accrued due after the testator's death ; and it prayed an account and payment of so much of the before-mentioned sum of 4047*l.* 5*s.* 8*d.* as was received in respect of arrears of the annuity accrued due after the testator's death upon the principle of giving credit to the defendant for the before-mentioned sum of 488*l.* 10*s.* 6*d.* paid to the widow on the settlement of the account of the 7th of October, 1830, and an account and payment of interest upon the residue of the sum of 4047*l.* 5*s.* 8*d.* from the receipt of that sum to the widow's death ; and that if it should be held that the accounts between the defendant and the widow ought to have been taken upon the defendant's principle, or that the plaintiff was now precluded from insisting to the contrary, then that the plaintiff might be at liberty to surcharge and falsify the account of October, 1830, by charging the defendant with the amount of the dividends from the month of June, 1825, to the widow's death, upon the sum of consols, which by such account it was estimated that the value of the annuity at the testator's death

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would have purchased ; and that the defendant might be ordered to pay to the plaintiff the amount of such dividends accordingly.

Evidence having been taken, the cause was heard before the Master [·296] of the Rolls, who, by his decree, declared \*that the account of the 7th of October, 1830, was not a binding and valid settlement of accounts between the widow and the defendant, and that it ought to be opened and set aside: and that, according to the true construction of the will, the widow was entitled, during her life, to receive the whole of the rents of the leasehold house in the Strand, and that she was also entitled to the whole of the payments of the annuity of 100*l.* which accrued due after the testator's death, and was also entitled, for her life, to receive the interest of the sums received in respect of the arrears of that annuity which accrued due in the lifetime of the testator. The decree then proceeded to direct certain accounts to be taken upon the footing of the before-mentioned declaration ; and it ordered that the master should compute interest at four per cent. upon the balance which he should find due from the defendant in respect of the arrears of the annuity accrued due in the lifetime of the testator from the time at which the defendant received such arrears to the time of the widow's death. The defendant was ordered to pay the plaintiff's costs of the suit.[1]

From this decree the defendant appealed, insisting that the bill ought to have been dismissed with costs.

The *Solicitor General*, Mr. *Tinney* and Mr. *Sharpe*, for the plaintiff.

Mr. *Wigram*, Mr. *Richards*, and Mr. *Lloyd*, for the defendant.

Upon the question of law involved in the case, the following authorities were referred to ;—*Howe v. Earl of Dartmouth*,(a) *Livesey v. Livesey*,(b) *Collins v. Collins*,(c) \**Alcock v. Sloper*,(d) *Bethune v. Kenedy*,(e) *Mills v. Mills*.(g)

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*July 10.*—THE LORD CHANCELLOR [after referring to the facts of the case and stating that the evidence clearly showed that the agreement could not stand, proceeded as follows] :—

'That brings it to the question upon the will, and the first question upon the will is, whether this alleged account was taken at any reasonable time after the death.

The death happened in the year 1801, and the alleged agreement is of the year 1830.

The son was the executor. The mother was tenant for life. The property, so far as it was affected by the arrangement made in the year 1830, is a leasehold house in the Strand, and what was then supposed to be a lost property, an annuity payable by a party from whom nothing had been received

(a) 7 Ves. 137.

(b) 3 Russ. 287.

(c) 2 Mylne & Keen, 703.

(d) 2 Mylne & Keen, 699.

(e) 1 Mylne & Craig, 114.

(g) 7 Sim. 501.

[1] The case before the Master of the Rolls is reported, 2 Beav. 31.

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for a great number of years, and who was supposed to be insolvent. So far, therefore, as the property was producing anything, it consisted of a leasehold house, of which the son, as executor, was legally possessed, and of which he had himself received the rents—or permitted his mother to receive the rents—from the year 1801 to the year 1830; and in the year 1830 he conceives the idea that she, being tenant for life, ought not to have received the rents, but that the house should have been sold, and the interest of the produce paid to his mother for her \*life. Now, without adverting, at present, to the [\*298] length of time which elapsed before he made this demand, during all which period he permitted his mother to receive the rents, or received them himself, and paid them to his mother,—the question is upon the construction of the will.

Very nice distinctions have been taken, and must have been taken, in determining whether the tenant for life is to have the income of the property in the state in which it is at the time of the testator's death, or the income of the produce of the conversion of the property. The principle upon which all the cases on the subject turn is clear enough, although its application is not always very easy.

All that *Howe v. Lord Dartmouth*, (a) decided—and that was not the first decision to the same effect—is that, where the residue or bulk of the property is left *en masse*, and it is given to several persons in succession as tenants for life and remainder-men, it is the duty of the court to carry into effect the apparent intention of the testator. How is the apparent intention to be ascertained, if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in such a state as will allow of its being so enjoyed. That cannot be, unless it is taken out of a temporary fund and put into a permanent fund.

But that is merely an inference from the mode in which the property is to be enjoyed, if no direction is \*given as to how the pro- [\*299] perty is to be managed. It is equally clear that, if a person gives certain property specifically to one person for life, with remainder over afterwards, then, although there is a danger that one object of his bounty will be defeated by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the court cannot overlook.

If a testator gives leasehold property to one for life, with remainder afterwards, he is the best judge whether the remainder-man is to enjoy. The intention is the other way, so far as it is declared, and the terms of the gift, as a declaration of intention, preclude the court from considering that he might have meant that it should be converted.

Those two kinds of cases are free from difficulty, but other cases of very great difficulty may occur in which it may be very doubtful whether the tes-

(a) 7 Ves. 137.



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tator has left property specifically, but in which there are expressions which raise the question whether the property is not to be enjoyed specifically ; for as the Master of the Rolls appears to have observed in the present case, the word "specific" when used in speaking of cases of this sort, is not to be taken as used in its strictest sense, but as implying a question whether, upon the whole, the testator intended that the property should be enjoyed in specie. Those are questions of difficulty, because the court has to find out what was the intention of the testator as to the mode of management, and as to the mode of enjoyment.

Of all the cases which have been referred to, that one which appears [\*300] to me to be most near the present is the \*case of *Collins v. Collins*.(a)

*Alcock v. Sloper*,(b) which was also cited, is not so much in point, because there the testator gave to one person for life, and then directed that the property should be sold after his decease.

In *Collins v. Collins*, the gift was, "I give to my wife Sarah Collins all and every part of my property in every shape, and without any reserve, and in whatever manner it is situated, for her natural life ; and at her death the property so left to be divided in the following manner, one-half in equal proportions to my father John Collins, and so on." Now there is no direction there for conversion : there is a gift of property described to be of various qualities, which the wife is to have for her life ; and after her death it is to be divided. Sir J. Leach was of opinion that there was a sufficient indication of intention that she should enjoy the property in specie.

Now it appears to me that that case is as near to this as any two cases can be to each other ; because, in that case there was nothing but expressions applicable to a particular enjoyment of the property. Now, in this will, there are expressions referable to the particular descriptions of property the testator had. There is, after the death of the wife, a direction that it shall go over to a particular person, but there is that which makes it more like *Collins v. Collins* than like any other case, because he directs it, in a certain event, to be divided.

It remains, therefore, to see what expressions there are in this will which bring it within *Collins v. Collins* ; but before I do so I will say that I entirely concur in *Collins v. Collins*, and that I think it would be a [\*301] \*violation of the testator's intention not to allow the wife to enjoy the income of the property as it is.

His words are, "subject to and after payment of my debts, and the sums of money and legacies hereinafter given, and such annuities and insurances as I am liable to pay, I give and bequeath to my said wife all the interest, rents, dividends, annual produce and profits, use and enjoyment, of all my estate and effects whatsoever, real and personal, for and during the term of her natural life."

(a) 2 Mylne & Keen, 703.

(b) 2 Mylne & Keen, 699.



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Well, he then gives her certain specific articles, and then comes a clause which has been the subject of observation on both sides, but which appears to me to be very strong in favor of the tenant for life :—

“I give to my said wife for her own absolute use and benefit all the rest of my household furniture, wine, coals, and other stores, linen and china, and fifty volumes of my books, to be selected by herself (folios excepted,) but only the use for her life of my plate and pictures.” So that he had given her the enjoyment for life of certain property, then he gives certain articles, in words, which might have included the plate and pictures, but he excepts them, and says he intends that they should fall under that gift in which he gives her the use and enjoyment of all his property.

Then he says, “and at the decease of my said wife I give, devise, and bequeath unto my said son-in-law, Edward Rowland Pickering, all the rest and residue of my estate and effects whatsoever, both real and personal ; to hold to him, his heirs, executors, administrators, and assigns for ever, subject as aforesaid, and to the payment of such sum and sums of money as I have undertaken or shall undertake to pay after my said wife’s decease.”

\*Now he had not given the rest and residue of his estate in those [\*302] words before. He gives no rest and residue till after the decease of his wife. Was it rest and residue at his death, or was it rest and residue at his wife’s death ? We must look at the words of the will for the purpose of ascertaining that. Now he gives at her decease ; but to justify the defendant’s construction we must read the words rest and residue as meaning rest and residue at his own death, and not at his wife’s. It might be very different if she should live so long as this perishable property should last. “But if the said Edward Rowland Pickering shall die in her lifetime, not having married, then I give one-half part of such rest and residue of my estate and effects, subject to the payment of one-half of such sum and sums first and last above alluded to, unto my nephew John Surel Andree, and my niece Mary Ann Andree, equally to be divided between them, to hold to them or the survivor, if one only shall survive my wife, their, his, and her heirs, executors, administrators, and assigns for ever ;” which brings it precisely within *Collins v. Collins*. Then there is a codicil which is only important as it shows the nature of the property, and how unlikely it is that the testator intended that the property should all be immediately converted.

[His Lordship then read the codicil.]

So that, from this codicil, we have this fact, namely, that there was an annuity which the testator was liable to pay. The case shows that there was also an annuity which he was entitled to receive, and it appears he had insured a particular person’s life. He makes a specific appropriation of what he shall so receive. He might sell the annuity he was entitled to receive, but he could not get rid of the annuity he was liable to pay. How is the principle of *Howe v. Lord Dartmouth* to be carried into effect as to these sums ? [\*303]

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It is also a strong indication of what the testator himself meant, because he says, "subject to such annuities and insurances as I am liable to pay," and it is obvious that, if the property were all converted, the interest of the tenant for life might be entirely destroyed, because the income might not be enough to pay the annuity and the insurances.

It is often very difficult to carry out the principle of *Howe v. Lord Dartmouth*. Here was the annuity for many years not paid; the tenant for life got nothing from it. It was not saleable; for the party liable to pay it was supposed to be insolvent. Suppose it had been foreseen that it would ultimately be recovered, still a sum of money payable thirty years hence cannot be much relied on. All that time the tenant for life gets nothing.

The only way in which justice could be done would be to take the facts as they ultimately turned out, and see what was the value before, because that was all that the remainder-man was entitled to, namely, the value of the property convertible thirty years hence.

Great injustice would be done, if, where there is nothing in the will but a tenancy for life and a remainder, it is always to be held that the property is to be at once converted. Taking the principle, therefore, uniformly adopted in acting upon *Howe v. Lord Dartmouth*, namely, taking that as a case applicable to circumstances such as occurred in that case, where they are found to exist, and not controlling cases where a contrary intention is to be [\*304] found in the will, and \*considering it quite as well settled as *Howe v. Lord Dartmouth* itself is, that when you find an indication of intention that the property is to be enjoyed in its existing state, it shall be so enjoyed, I think that justice could not be done if the principle of *Howe v. Lord Dartmouth* were applied to the circumstances of this case; and I therefore think that the judgment of the Master of the Rolls is quite right.[2]

It is not necessary for me to enter into a consideration of what should be done in a case where a party has allowed the tenant for life for thirty years to enjoy the property in specie; where he has thirty years acquiesced in the tenant for life's enjoyment of it in specie, he himself being all the while the proper hand to receive the money.[3] It is unnecessary for me to enter into that question, because the question raised now is the same which might have been raised immediately after the testator's death, and arises now in the same manner.

I think, therefore, the Master of the Rolls was right. There was, undoubtedly, some doubt upon the will; and if the case turned upon the construction of the will alone, I should think it a very fair case for appeal; but when I find it did not turn on this will only, but that the object of the appeal is

[2] A number of cases regarding the doctrine of conversion are referred to 2 Beav. 514, n. (a) And see *Johnson v. Woods*, id. 409; *Lichfield v. Baker*, id. 481; *Goodenough v. Tremamondo*, id. 512; *Benn v. Dixon*, 10 Sim. 638, and notes 1 and 2; *ibid.* 639, n. 2; *Vauhan v. Buck*, 1 Phillips, 75; *Cairns v. Chaubert*, 9 Paige, 160; *Harvey v. Harvey*, 5 Beav. 134; *Caldecott v. Caldecott*, 1 Yo. & Coll. C. C. 312.

[3] Vide *Nicholson v. Hooper*, ante, 179.

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also to establish the transaction between the son and his mother, I am bound to dismiss the appeal with costs.

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*\*Between JAMES SUART and JOHN SIMPSON, Plaintiffs; and JOHN WELCH, THOMAS HUDSON, and THOMAS POSTLETHWAITE, Defendants.* [\*305]

1838 : December 15, 17, 20. 1839 : January 19.

One of several part owners of a ship, acting as ship's husband, directs a broker to effect an insurance upon the entirety of the ship. A loss happens ; and the insurance money being paid to the broker, who knew what other persons were part owners of the ship, one of the other part owners demands payment of his proportion of the insurance money, and commences an action against the broker to recover it ; and the part owner who directed the insurance demands payment of the whole, and commences an action to enforce such demand : Held, that the broker could sustain a bill of interpleader against the two claimants.

THE bill in this cause sought to make the defendants interplead with respect to a sum of 435*l.* 5*s.*, which was stated to be the proportion of the moneys, recovered upon the insurance of a ship, which fell to the defendant Postlethwaite's share, as one of her owners, but was claimed by the other defendants.

In the month of November, 1828, the plaintiffs carried on business in partnership in London, as insurance brokers, and the defendants Welch & Hudson carried on business in partnership at Liverpool, as merchants, brokers, general agents, and ship-owners.

In the month of November, 1828, the defendants and one Oliver Toulmin Roper were the owners of a ship called the *James*, in the following proportions, viz. Welch & Hudson owned seven sixteenths, Roper six sixteenths, and Postlethwaite three sixteenths. Welch & Hudson were the managing owners and ship's husbands, and, in the month of November, 1828, they employed the plaintiffs, who knew that the three defendants and Roper were interested in the vessel, to effect insurances upon the vessel and her freight ; and the plaintiffs insured the ship and freight accordingly. The ship was lost, and considerable sums were recovered by the plaintiffs upon the policies of insurance.

*\*In the mean while, the following correspondence took place.* [\*306]

On the 14th of May, 1829, the plaintiffs wrote to Welch & Hudson as follows :—

*“ London, 14th May, 1829.*

*“ Messrs. Welch & Hudson,*

*“ Dear Sirs,—We duly received your much esteemed favor of the 12th instant, and we are sorry indeed to hear so lamentable an account of the *James*. We had a report here a few days since that she was condemned, sold, and broken up, but no one could believe it. The underwriters and the Royal*

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Exchange Company are anxious to see the papers, and particulars how the mischief happened ; and please inform them how much was insured in all, by whom, and the particulars of the shares held by each owner, as the forms of the company require this should be done, and we are anxious to save time : and please say also if any thing was uninsured either on vessel or cargo ; and a copy of the manifest of the latter, that we may be fully prepared with all the needful information without our having to trouble you again : and from what we have this day understood, Captain Searchwell had best remain at Liverpool for the present, that the underwriters may send for him to London, if needful. They cannot account for there being no proceeds of ship in any way. There is no similar case in the remembrance of any one here, from Fayal or any place so near home from whence the needful assistance could be obtained. And waiting your reply,

“ We remain with great and sincere respect,

“ Dear Sirs,

“ Yours always very truly,

“ *Suart & Simpson*”

[\*307] \*On the same day (viz. the 14th of May, 1829,) Roper wrote to the plaintiff Simpson in the following terms :—

“ I yesterday received a letter from Welch & Hudson, informing me that Captain Searchwell and his crew had arrived in Liverpool on the 12th, the James having been condemned at Fayal ; that the hull and materials, with about one-third of the salt, which was all that was left, had been sold ; that the proceeds had not paid the expenses there, leaving a balance against the ship of about 30*l*. As I never was in a similar mess, may I beg your attention to this lamentable business, on behalf of Captain Postlethwaite and myself. We must safely rely upon you. At the same time, I should be obliged by your letting me know per return, as I leave here for Manchester on Monday, what proceedings are to be taken. Can you give a good account of the underwriters ? Who pays the expenses at Fayal ? When is the loss usually settled ? Have I any documents to send up ? But if there is anything to be received by the owners, let me know as Captain P. and I may give further instructions. I have not yet heard from him. The others and we are rather out ; but it won't do to explain by letter. You will see by Minshull's assize intelligence, what was attempted : that drew my attention to some particular account, which you, if I live, shall see in the party's own handwriting. However, this is nothing to the present purpose. It is possible, but barely possible, I may be in town before you come here ; in the meantime I trust you will act as agent, fully empowered both by P. and self.”

On the 23d of May the plaintiff Simpson wrote to Roper as follows :—

[\*308]

\*“ *London, 23d May, 1829.*

“ My dear Sir,—Mr. Welch from Liverpool arrived here this evening, no doubt on account of the James, about which nothing has been

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done yet, or will be, for some days to come. I know not if you wish to arrange any matter with him for the insurance. You need not come up until I think any good is to be done by your coming; but if you and Captain P.<sup>(a)</sup> will inform me how I can be of any service to them, I will try hard to meet their wishes as far as may be in my power. I do not think the loss will be considered in the committee for at least ten days to come, at all events a week hence, when I will inform you the result without loss of time; and in the meantime we shall come under no engagement about the needful, on any account, you may depend. Excuse this scrawl, but thought it best you should know of Mr. Welch being here."

On the 28th of May, the plaintiff Simpson wrote to Roper again as follows:—

"Dear Sir,—I wrote to you a few hasty lines on the 23d instant, since which I am without the pleasure of hearing from you. I was in hopes you would have informed me if I could have rendered you and our mutual friend Mr. P. any service here about the vessel James, as I find W. is very much in want of the needful, and wishes us at once to come under engagements for the amount, even subject to be refunded if not paid; as no final answer may be given until Wednesday next, and until then I do not like to come under any engagement; but then if settled it cannot be avoided; *and unless you both sign a regular order not to pay the needful to any one else, we cannot well defer payment longer.* The order \*must be in such [\*309] shape as can be laid before Mr. W.; he is very anxious in the business, probably on account of the needful. This in confidence entirely to you. Let us hear from you at all events by return, and if Captain P. intends to act, he must prepare to come up, as we may send for one or both any hour if any thing is to be done; if not we will pay the whole amount when received to Messrs. W. & H. in the usual way.

"Believe me yours truly,

"*John Simpson.*"

On the 30th of May, Roper wrote to the plaintiff Simpson in the following terms:—

"My dear Sir,—On the 21st instant I wrote you, empowering you to act for Postlethwaite and myself in regard to the unfortunate James, and earnestly requesting your best assistance; in your esteemed favor of this morning, you state you were in hopes of hearing from me, informing you if you could render Captain P. or myself any services; to my last I beg a reference. As Postlethwaite and myself jointly have the majority of the vessel, and I fear the majority of the loss, I beg you will hold my proportion you may receive from the underwriters to my own order. Between you and myself, ———(b) has never paid S. Moore's estate for one-eighth part of the James; this I only found out in March, although he has a regular transfer; his confounded transfer has so confounded the accounts, it will take much longer time than

<sup>(a)</sup> Meaning the defendant Postlethwaite.

<sup>(b)</sup> A blank was left for this name in the brief.

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I can give them to clear the confusion. Again earnestly requesting your best exertions,

“ I am, &c.,

“ *Oliv. T. Roper.*”

[\*310] \*On the same day Roper wrote the following letter to the plaintiffs.

“ *Lancaster, 30th May, 1829.*

“ Messrs. Suart & Simpson,

“ Gentlemen,—Having some engagements to meet in London, in the course of a week or ten days, I have to request you will hold my proportion of the loss on the ship and freight done through you, that you may receive from the underwriters, until I give you orders to whom it is to be paid. If Mr. Welch or Mr. Hudson inquire why you retain so much, I will explain to them; Liverpool being so much nearer here than London, we have many opportunities; and those gentlemen, so soon as they render me an account of the money paid for the James's outfit, I will remit my proportion with interest.”

And on the same day, Postlethwaite wrote to the plaintiffs a letter containing the following passage:—

“ The present is to request that you will have the goodness to hold in your hands my proportion of what you receive from the underwriters on ship and freight, say three-sixteenth shares, and to pay no part of it to any one without my order; and will be happy to hear from you when this unfortunate business gets settled, which I hope will not be long.”

On the 13th of June, Simpson wrote again to Roper in the following terms:—

“ *London, 13th June, 1829.*

“ Dear Sir,—I had this pleasure some time ago, since which we are without any of your much esteemed favors. I find Mr. Welch has gone to [\*311] Liverpool on his way to Lancaster, from whence we have heard from Messrs. W. & H., and annexed beg to hand you a copy of our reply to him, from which you will be able to see how matters are going on here. Having one way or other advanced Mr. Welch somewhere about 200*l.* in cash, this, with nearly 1000*l.* premiums owing, he will not have much to receive out of 1250*l.* done on their joint account per the James; so that all the remainder in truth will belong to you and Captain Postlethwaite, when we have arranged with the underwriters; and in the mean time, you can all be arranging matters at Lancaster, so that every thing may be finally settled as soon as the money is ready to be drawn for. We shall be glad to hear how you are going on, at your convenience, in order that we may act accordingly, should we hear again from Mr. Welch, as we may probably soon do on this important business to him and to all concerned.”

On the 16th of June, Welsh & Hudson wrote to the plaintiffs as follows:—

“ Gentlemen,—Having effected the policy of insurance of 2400*l.* on the James, and 500*l.* on her freight in our own names for our own security, we



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hereby give you notice that we hold you liable to us for the payment of the whole amount received or to be received by you from the underwriters on those policies, and require you to pay us the whole amount.

*“Liverpool, 16th June, 1829.”*

On the same day Welch & Hudson sent to the plaintiff the following notice:—

“Gentlemen,—We hereby give you notice that the expenses of the outfit of the ship James, for and upon \*her late voyage, were incur- [\*312] red and paid by us as ship’s husbands; and there being still due and owing to us from Mr. Thomas Postlethwaite, his proportion of such expenses in respect of his share of the said ship, and also for his proportion of repairs and expenses of former voyages to a large amount, that you do not, until full payment by him of what is due from him to us on all accounts, pay over to him or his order any moneys or the balance of any moneys received or to be received by you upon or by virtue of any policy or policies of insurance which by our order you have caused to be effected and underwritten upon the said ship or her freight for the said voyage, or received or that shall be received by you in respect of the said ship, or the said freight, or the loss which has happened to the same respectively.

*“Liverpool, 16th day of June, 1829.”*

On the 9th of July, Welch & Hudson wrote to the plaintiffs in the following terms:—

“Gentlemen,—We enclose an order on you for 400*l.* from our mutual friend Mr. Roper, which we will thank you to remit us in cash, or, if more convenient, your acceptance at a short date including interest. You will observe the order is on condition of our withdrawal of the notice given to you respecting his share of the insurance on ship and freight, which we hereby do.”

On the 10th of August, 1829, the plaintiff Simpson wrote to Welch & Hudson the following letter:—

*“Lancaster, 10th August, 1829.*

“Messrs. Welch & Hudson,

“Dear Sirs,—On my arrival here I received your \*esteemed favor [\*313] of the 4th instant, annexing your account current for the loss of the James; but having no books here cannot say if it is quite correct or not, but presume there can be no material error, excepting the mode of —.(a) I fear nothing can be said about the balance at present from the notices given us by the owners of said vessel, unless they may be considered as withdrawn on account of the payment of the order given by Mr. Roper for 400*l.*, and which was instantly placed at your credit in account accordingly. In fact, when in London, your Mr. Welch had already received nearly 200*l.*, one half of it in cash; and your own account for premiums was then nearly 1000*l.* in our favor, together nearly 1200*l.*; and your own individual shares of the loss at that time settled with the Royal Exchange Company would only

(a) A blank exists in the copy contained in the brief.

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amount to about 700*l.* Surely you could not expect that we should do otherwise than place it at your credit, which was done, leaving a balance still in our favor from you of nearly 500*l.*, and placing this 400*l.* at your credit was in truth the same as paying you the money, in fact you had already got one-half as above stated. In all this business we have no kind of concern between you and the owners; our account is with you; the insurance was done for you; and we much wish to settle the balance arising from it, so far as we have settled with the underwriters. But from the notices given it appears you have received (with the above 400*l.* now at your credit) more than what is due to you upon what is settled by underwriters to this time, 114*l.* 2*s.* 6*d.*, so that the matter rests entirely between you and the other owners, and with which we have nothing whatever to do one way or other; but

should be very glad indeed to be released from the situation we find [\*314] ourselves placed \*in. We have done our duty to all, and you can

have no just cause of complaint against us on this or any other occasion. Rather give us some credit for the loss being so far and so much secured, than blame us for the little that remains undone; for as regards the underwriters not much remains to do with them on so singular a loss. There is, as already named to you, with the 400*l.* at your credit, due you 285*l.* 17*s.* 6*d.*, Mr. Roper 470*l.* 9*s.*, and Captain P. 435*l.* 4*s.* 9*d.*, and when you have arranged with them, we shall indeed be glad, but you are fully aware we are no party to the accounts between you and them and cannot interfere with them. You cannot in justice feel that any blame attaches to us on this subject—it has not arisen from us in any manner. We are glad it is even so far settled: you well know, if the captain had not sworn the *James* was totally broken up, the Royal Exchange Company would have tried the question. It may be the underwriters are now advised to try it in other cases of the same kind almost. They feel hurt, the ships *James*, *Mitchell*, *Atlantic*, *Stag* and others on which they have paid total losses by foreign condemnation, within eighteen months, are now all sailing about in good order. It is no part of my duty to defend the underwriters, but they name this in justification of delay. You well know our underwriters have paid you many losses well; and we have not yet had any policy in court. Though we may not always be so fortunate, yet give us credit for what we and our underwriters have done these twenty years past for you. I cannot but think if you will calmly reflect on all these matters, you will see that all might be amicably arranged by two friends in an hour, for really no one else can arrange it. There is nothing to litigate in the accounts; they are such as have and can be settled at once, so far as we are concerned, and have no wish to go further;

[\*315] I will name ———(a) London, if there is any error or omission in the account sent me.

“ And remain, dear Sirs, yours very truly,

“ *John Simpson.*”

(a) The name was omitted in the copy.

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“P. S. No one here has been advised with as regards this letter.”

The plaintiffs, as was admitted, paid or accounted to Roper for his share of the insurance moneys; but Welch & Hudson insisted that this had been done after he had paid to them the amount due from him to them for repairs and outfit, and in consequence of a written order from them to the plaintiffs for that purpose.

Shortly before the filing of the bill, both Welch & Hudson and Postlethwaite had respectively commenced actions against the plaintiffs, for the amount in question. These actions the bill sought to restrain, upon the terms of bringing the amount in question into court; and, shortly after the bill was filed, the plaintiffs obtained an order for that purpose. Welch & Hudson afterwards, upon putting in their answer, made an ineffectual application to have the money paid out to them.

The cause came on now to be heard.

It is conceived that the nature of the arguments is sufficiently stated in the judgment. The following cases were referred to, viz. *Drinkwater v. Goodwin*,(a) *Stevenson v. Mortimer*,(b) *Roberts v. Ogilby*,(c) *Lowe v. Richardson*,(d) *Nickolson v. Knowles*,(e) *Mitchell v. Hayne*,(g) [\*316] *Crawshay v. Thornton*,(h) *Dixon v. Hamond*,(i) *Sargent v. Morris*,(k) *Sims v. Brittain*,(l) *Sims v. Bond*,(m) *Braik v. Douglas*,(n) *Duke of Norfolk v. Worthy*,(o) *Sadler v. Leigh*,(p) *Coppin v. Walker*.(q)

The *Solicitor-General* and Mr. *Richards*, for the plaintiffs.

Mr. *Wigram* and Mr. *Booth*, for the defendants Welch & Hudson.

Mr. *Jacob* and Mr. *Puller*, for the defendant Postlethwaite.

1839; Jan. 29.—THE LORD CHANCELLOR:—The first ground upon which it was contended, on the part of the defendants Welch & Co., that this was not a proper case of interpleader, was, that it came within the principle of *Crawshay v. Thornton*,(r) inasmuch as the plaintiffs had, by a letter of the 10th of August, 1829, come under a personal liability to the defendants Welch & Co., independently of such liability as might exist from the situation in which they are placed, with reference to the property in question. I am of opinion that this letter cannot have this effect. The whole tenor and the declared object of it was of a precisely opposite character. It tells Messrs. Welch & Co., that nothing \*can be done [\*317] about the balance, from the notices given by the owners. It says, indeed, that the plaintiffs had no kind of concern between Welch & Co. and the owners; that their account was with Welch & Co.; that the insurance was done for Welch & Co. But this was said as a justification of their hav-

(a) Cowp. 251.

(d) 3 Mad. 277.

(h) 2 Mylne & Craig, 1.

(l) 4 B. & Adol. 375.

(o) 1 Camp. 337.

(r) 2 Mylne & Craig, 1.

(b) Cowp. 806.

(e) 5 Mad. 47.

(i) 2 B. & Ald. 310

(m) 5 B. & Adol. 389.

(p) 4 Camp. 195.

(c) 9 Price, 269.

(g) 2 Sim. & Stu. 63.

(k) 3 B. & Ald. 277.

(n) *Vide infra*, p. 320, n.

(q) 7 Taunt. 237.

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ing insisted upon placing 400*l.*, a part of the insurance money, to the credit of the account of Welch & Co. And if those expressions could be construed to have a more extended meaning, they only stated the facts as they occurred, and contain no new contract, independently of what the law would deduce from such facts. The letter immediately proceeds to say, that the plaintiffs much wished to settle the balance so far as they had settled with the underwriters; but that, from the notices given, it appeared that Welch & Co. had received more than what was due (that is, as between themselves and the owners,) “so that the matter rests entirely between you and the other owners, and with which we have nothing whatever to do one way or other, but should be very glad indeed to be released from the situation we find ourselves placed in;” and after stating the sums claimed by the other owners proceeds, “when you have arranged with them, we shall indeed be glad; but you are fully aware we are no party to the accounts between you and them, and cannot interfere with them. You cannot in justice feel that any blame attaches to us on this subject—it has not arisen from us in any manner.”

It was argued that the case of *Roberts v. Ogilby*,<sup>(a)</sup> was an authority to show, that this letter was of itself sufficient to make the plaintiffs liable to Welch & Co.: but the letters in that case were relied upon as proving [\*318] that the broker had acted wholly under the direction of “the part owner who had directed the insurance, a fact not in dispute in this case, and not that he had by such letter entered into any independent liability. I am very clearly of opinion, therefore, that there is nothing in this case to bring it within the principle of *Crawshay v. Thornton*.

It was then said, that there was evidence of collusion between the plaintiffs and the other owners, in a letter from them to Roper of the 28th of May, 1829. It appears that Mr. Roper, writing on behalf of himself and Postlethwaite, had on the 14th of May, written to the plaintiffs, desiring to be informed if anything were to be received by the owners, that they might give further instructions; and that the plaintiffs, in their answer of the 23d of May, told him that they would not come under any engagement (that is, with Welch & Co.) about the money; and in the letter of the 28th of May, they tell him that Mr. Welch is very anxious that they should come under engagements for the amount, and that if a settlement took place with the underwriters, it could not be avoided, unless the other owners signed a regular notice not to pay to any one else, and if that was not done, they should pay the whole amount when received to Messrs. Welch & Co. in the usual way; who, it appears by the letter of the 10th of August, 1829, were their debtors upon the general account. Regular notices to hold their proportion were sent by Roper and Postlethwaite on the 30th of May, and by Welch & Co., to pay the whole to them on the 16th of June. In this there is not any proof of collusion. The plaintiffs being applied to by the other owners,

(a) 9 Price, 269.

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tell them how the matter stands, and that they shall pay to Welch & Co. unless they have regular notices from the other owners not to do so.

\*The case then is reduced to this. One of several part own- [\*319] ers of a ship, acting as ship's husband, directs a broker to effect insurance upon the entirety of the ship. A loss happens, and the insurance being paid to the broker, who knew what other persons were part owners of the ship, one of the other part owners demands payment of his proportion of the insurance money, and commences an action against the broker to recover it; and the part owner who directed the insurance, demands payment of the whole, and commences an action to enforce such demand.

It cannot be contended, that a broker simply executing his duty in receiving the insurance money from the underwriters, and not having come under any collateral liability to either party, ought to be subject to this double litigation, for the purpose of obtaining a decision as to which of the part owners is entitled to receive the money. The adverse claims being made, it is not for him to decide the question between the claimants, and take the chance of such decision being sanctioned, when the action of the party against whom he shall decide comes to be tried; nor is it the duty of this court, in this proceeding, to give any opinion upon such adverse claims, but only to place the parties in a proper situation to have their rights decided upon as between themselves. I therefore abstain from giving any opinion upon the claims of the defendants. The cases referred to prove, at least, that there is a question to be tried between them.

It was contended, that admitting the right of interpleader in this case would be an invasion of the rule, that there can be no interpleader between principal and agent.[1] I do not repeat what I said upon that subject in *Crawshay v. Thornton*; and it does not appear to me, \*that the con- [\*320] sideration of that principle is involved in the facts of this case; for the question is not under what circumstances, if any, an agent can support a bill of interpleader against his principal, but who is the principal for whom the party seeking the protection of an interpleading suit ought to be considered as agent. The insurance is made on behalf of the owners of the ship. The part owner who did not direct the insurance says, "You effected the insurance on behalf of all and every the person and persons to whom the ship appertained. I am one of the principals for whom you so acted in effecting the insurance and receiving the money; and you knew at the time you received the money that I was such part owner; therefore, account to me for my share." But the owner who directed the insurance, says, "The question

[1] The general rule is, that an agent cannot dispute the title of his principal; from which it is a legitimate deduction, that an agent cannot, under ordinary circumstances, file a bill of interpleader against his principal; as such a bill, if it does not directly question the principal's title, at least implies that it is doubtful; interpleader between principal and agent being admissible only, where the adverse claim is under a derivative, and not under a paramount title. *Paley's Pr. & Agt.* (ed. by Danlap) 10, n. (k).



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of agency is to be decided, not by the ownership of the ship, but by the orders under which the broker acted." The language of Chief Baron Richards in *Roberts v. Ogilby*(a) on one side, and of Mr. Justice Bayley in the unreported case of *Braik v. Douglas*(b) upon the motion to enter a [\*321] nonsuit, upon the \*other side, seems to put the question upon this point; and this is a point which must be decided between the two

(a) 9 Price, at p. 281.

(b) *BRAIK v. DOUGLAS*.—This cause was tried before Lord Tenterden and a special jury, at the London sittings after Michaelmas term, 1828.

The plaintiff, Alexander Braik, was the owner of one-third of the ship *Hannah*, and one William Gibson of Liverpool, was the owner of two-thirds of the same ship. Gibson was the ship's husband. He had mortgaged his shares to Douglas, Anderson & Co., of London, who were insurance brokers, and were the defendants in the cause. On the 2d of February, 1827, the defendants wrote to Gibson a letter containing the following passage:—"We have insured the amount on the *Hannah* on which we have a mortgage, viz. 43-64th shares, valued at 2687*l.* as per annexed copy of policy, and debit you 88*l.* 0*s.* 8*d.* for premium and duty;" and containing a postscript in the following words;—"You will observe that we have insured the *Hannah* for the amount at which she is valued in our books, which is 687*l.* more than you ordered to be done; we have been obliged to do this to preserve us from loss." The letter to which this was an answer did not appear; but it appeared that on the 7th of February, 1827, Gibson wrote to the defendants as follows:—"You will please insure per *Hannah*, Byass, hence to Charleston and back, a further sum of 1300*l.* valuing the ship at 3987*l.* at 60*s.* per cent. We were not quite fixed on our Charleston voyage when I ordered the 2000*l.* insurance, or the whole sum would have been sent you at that time."

In pursuance of the directions contained in this letter, Douglas, Anderson & Co. effected an insurance, as agents, upon the ship *Hannah* generally, and not upon any particular shares, to Charleston and back, for 1300*l.*, valuing the ship at 3987*l.*; and they debited Gibson with the premiums on both insurances. On this voyage the *Hannah* sustained an average loss, which was afterwards adjusted by the defendants as brokers, at 174*l.* 12*s.* 5*d.*

On the 30th of June, 1827, Gibson wrote a letter to the defendants, which, after directing them to insure the ship *Rachel*, at and from Hamburgh to Maranham and back to Liverpool, at a premium not exceeding 50*s.* per cent., contained the following passage:—"You may also insure 3000*l.* per *Hannah* for the same voyage, with the exception of sailing from Liverpool, and at not a higher rate of premium.—Sailing from Liverpool should reduce the premium." The defendants, in pursuance of these instructions, insured 3000*l.* upon the *Hannah*, generally.

On the 26th of July, 1827, Gibson wrote to the defendants, "I have hastily to request you to insure 600*l.* more per the *Hannah* for the same voyage, and the same premium as the policy for 3000*l.*, and charge me with premiums, &c. The defendants accordingly insured 600*l.* more upon the *Hannah*, generally.

Intelligence having been received of the arrival of the *Hannah* at Maranham, Gibson, on the 6th of December, 1827, wrote to the defendants as follows:—"I will thank you to effect insurance for me, 500*l.* on freight per *Hannah*, at and from Maranham to Liverpool, rating the freight at 1000*l.* and charging at what you may consider a fair premium to my account." The defendants accordingly effected a policy for 500*l.* on the freight, valued at 1000*l.*

All the five policies were in the common form.

The *Hannah* and cargo were totally lost on the voyage from Maranham to Liverpool, and intelligence of this occurrence reached Liverpool a few days after the date of Gibson's letter of the 6th of December, 1827.

In March, 1828, Gibson became a bankrupt.

After the total loss was known, the plaintiff gave notice to the defendants to hold his proportion of the amount of both losses at his disposal, and brought the present action to recover the two proportionate sums. As to the first, Lord Tenterden, at the trial, left it to the jury to say whether



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claimants. The same sum is claimed by the defendants, and admitted to be due by the plaintiffs so that the case of *Mitchell v. Hayne(a)* has no application. [\*322]

\*The case of *Nickolson v. Knowles(b)* was cited as an authority to show that this was not a proper case of interpleader. The facts of that case are very shortly stated. The party giving the notice is described as a secret partner, and not as a part owner; and it must be assumed, that the broker, at the time he received the money, had no knowledge of his title. The facts were probably very different from the present. If they were the same, the authorities at law show that Sir J. Leach was not warranted in refusing the injunction upon the ground that the case of the party giving the notice was so clearly unfounded as not to entitle the plaintiff to have it tried. [\*323]

It remains to be considered, in what form this question between the defendants can be most conveniently tried; and it appears to me, as Postlethwaite is the intervening party, that his action should proceed, and that Messrs. Welch & Co. should defend it in the names of the plaintiffs the brokers: and the action of Welch & Co. will, of course, be stayed.[1]

at the time the insurance for the first voyage was effected, the defendants knew that the 1300*l.* was intended to cover the interest of some other person in the ship; and secondly, whether, when the defendants effected the insurance upon the voyage to Maranham, they knew that such insurances were intended to cover the interests of other persons; and his lordship directed the jury to find in each case for the plaintiff, if they were of the affirmative opinion. The jury found for the plaintiff, on both voyages.

On the 20th of January, 1829, the defendants, in pursuance of leave reserved, moved for and obtained a rule to show cause why the verdict should not be set aside, and a nonsuit be entered.

Cause was shown on the 6th of February, 1830, and on the 7th the court of king's bench decided in favor of the plaintiff.

Sir James Scarlett, Mr. F. Pollock, and Mr. Tomlinson, for the plaintiff.

Mr. Campbell and Mr. R. C. Scarlett, for the defendants.

The facts above stated are taken from papers in the cause, with the loan of which the reporters have been favored by Messrs. Oliverson, Denby, and Lavie, the plaintiffs' solicitors in *Suart v. Welch*.

(a) 2 S. & S. 63.

(b) 5 Mad. 47.

[1] When a bill of interpleader lies, and as to the proceedings and practice thereon, see 1 Sim. & Sta. 64, n. 1; 2 Myl. & Cr. 24, n. 1; *Jew v. Wood*, Cr. & Ph. 185; *Hoggart v. Cutts*, id. 197. "The office of an interpleading suit is not to protect a party against a double liability, but against double vexation in respect of one liability. If the circumstances of a case show that the plaintiff is liable to both claimants, that is no case for interpleader. It is of the essence of an interpleading suit, that the plaintiff shall be liable to one only of the claimants, and the relief which the court affords him, is against the vexation of two proceedings on a matter which may be settled in a single suit." Wigram, V. C. *Crawford v. Fisher*, 1 Hare, 441.

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 1839.—Trash v. Wood.
 

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[\*324]

\*TRASH v. WOOD.

1839 : February 9, 11 ; November 20.

Devise of a copyhold to trustees and the survivor of them, and the executors and administrators of such survivor for ever, upon trust, out of the rents and profits, to pay certain yearly charges, and the residue to T., for life ; and from and after his decease, to pay the residue as aforesaid, to T.'s children, and so on for ever ; and for want of children lawfully begotten, to the testatrix's daughters : Held, that T. took an equitable estate tail under this devise.

T. received the rents during his life, but having an equitable estate only, was not admitted tenant of the copyhold, and died, leaving several sons. The custom proved, with respect to the descent of copyholds within the manor, was, that upon the death intestate of a tenant seised of an estate of an inheritance, his younger son was his customary heir : Held, that the youngest son of T., and not the eldest, became entitled, on his father's death, to call for a conveyance of the copyhold, as tenant in tail under the devise.

ELIZABETH SWANE being seised of a copyhold messuage and premises held of the manor of Heathfield, by her will, dated the 26th of May, 1763, gave and devised the same (which she had duly surrendered to the use of her will) unto Richard Collins and Joseph Harmer, and the survivor of them, and the executors and administrators of such survivor, for ever, upon trust, from time to time for ever thereafter, out of the rents and profits, to pay certain yearly outgoings and charges therein mentioned, and in particular to pay 20s. a year to each of her three daughters during their lives ; "and the residue unto my grandson, Jonathan Trash, for and during the term of his natural life ; and from and after his decease, to pay the residue as aforesaid unto his children, and so on for ever ; and for want of children lawfully begotten, to my said three daughters, for the term of their natural lives, equally between them, and from and after their decease, to pay the residue, after taxes, lord's rent, repairs, expenses, and charges as aforesaid are deducted, unto all my grandchildren, equally between them, and so on to their children for ever."

Jonathan Trash, under this devise, was let into the receipt of the rents and profits of the devised premises, but he was never admitted as tenant.

[\*325] He died in the month of August, 1832, leaving the \*plaintiff James Trash his youngest son, the defendant Samuel Trash his eldest son, and the defendants Sarah Haffenden, Martha Corley, Elizabeth Lusted, and Mary Crouch, together with a son, Thomas, who fifteen years ago had gone abroad, and had not since been heard of, but who was made a nominal defendant, his only other children. Another son, who was younger than Samuel, but older than the plaintiff, died in his father's lifetime, and left two sons, who were also made defendants.

The defendant Wood was the representative of the last surviving trustee, and had been duly admitted tenant of the premises, upon the trusts of the will.

The bill was filed by the youngest son of Jonathan Trash, praying a declaration of his title as heir according to the custom of the manor, a surrender

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of the copyhold messuage to his use, and an account of the rents accrued since his father's death.

The answer stated, and the evidence in the cause proved the custom of the manor, with respect to descent, to be, that upon the death and intestacy of a tenant of the manor, seised of an estate of inheritance in copyhold lands within the manor, leaving an elder and a younger son, the younger son was the customary heir.

The cause having now come on to be heard, two questions were made; first, what estate was taken by Jonathan Trash, whether a life estate or an estate tail; and, secondly, supposing the father to have taken an estate tail under the devise, whether the custom applied to this case, the father not having died seised of the copyhold in question, but the legal estate being outstanding in the representative of the surviving trustee.

Sir *W. Horne* and Mr. *Moore*, for the plaintiff, contended, as to the first point, that upon the true \*construction of the will, Jonathan [\*326] Trash took an estate tail under the devise; that being the only construction by which effect could be given to the manifest intent of the testatrix. In support of their argument they referred to *Wild's Case*, (a) *King v. Melling*, (b) *Ræd. Dodson v. Grew*, (c) *Robinson v. Robinson*. (d) Upon the second point, they submitted, that, in the absence of evidence to the contrary, the custom would extend to and include equitable estates, by analogy to the rule of law; or that, if it were confined to the case of a tenant dying seised, Jonathan Trash would, in equity, be considered, for this purpose, as having been seised.

Mr. *Wigram*, for Samuel Trash, the eldest son of Jonathan Trash.—The eldest son, and not the youngest, is entitled to this estate. The answer insists, and the evidence proves, that “dying seised” is of the essence of the custom. Wherever a special custom is relied upon at law, the courts require that the case shall be brought strictly within it; *Watkins on Copyholds*, (e) *Locke v. Colman*. (g) Thus, where a customary descent to the youngest son depends upon the ancestor dying seised, it has been repeatedly determined that if the ancestor did not die actually seised, as in the case of a surrender made to the use of a person who has not been admitted thereupon, the special custom will not apply; *Pain v. Herbert*, (h) a case which is also stated, in *Clements v. Scudamore*, (i) under the name of *Hale v.* —. Equity proceeds by analogy to this principle; as in the instance of refusing dower out of a trust estate. So, in \*the case of executory trusts; [\*327] *Scriven on Copyholds*, (k) *Watkins on Copyholds*. (l) So, where dis-

(a) 6 Rep. 16, b.

(b) 1 Ventr. 214, 225.

(c) 2 Wils. 322.

(d) 1 Burr. 38.

(e) Vol. i. p. 62.

(g) 1 Mylne & Craig, 423; and vol. ii. p. 635.

(h) Cited in 2 Keb. 158.

(i) 1 Salk. 243; 6 Mod. 120; 1 P. Wms. 63; 2 Lord Raym. 1024; and see 1 *Scriven on Copyholds*, 36–38, 3d ed.

(k) Vol. i. p. 497, 3d ed.

(l) Vol. ii. p. 62.

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tribution in case of intestacy followed the custom of York, it was held, after great consideration, that the mere appointment of executors took the case out of the custom, although there was a clear equitable intestacy.<sup>(a)</sup> At law, the principle is of the strictest application. An actual dying seised is necessary to confer the title to dower, and is also material in regulating descent. Thus, where lands descending *ex parte materna* are devised upon condition, the heir *ex parte paterna* can alone enter for the condition broken.<sup>(b)</sup> So in equity there is no escheat of a trust estate; *Burgess v. Wheate*.<sup>(c)</sup>

Upon the other point, Mr. *Wigram* took the same line of argument, and relied upon the same authorities as the plaintiff.

Mr. *Campbell*, for the daughters of Jonathan Trash, insisted, that upon the true construction of the will, the father took no more than a life estate in the devised copyhold, and that upon his death, all his children who were then living, daughters as well as sons, became entitled to a life interest in the devised premises. In support of this proposition, he cited and relied upon the cases of *Buffar v. Bradford*,<sup>(d)</sup> *Ginger v. White*,<sup>(e)</sup> *Goodtitle v. Woodhull*,<sup>(g)</sup> *Ives v. Legge*,<sup>(h)</sup> *Luddington v. Kime*,<sup>(i)</sup> *Bamfield v. Popham*.<sup>(k)</sup>

Mr. *Cooper* and Mr. *Elderton* appeared for other parties.

[\*328] \*1839; Nov. 20.—THE LORD CHANCELLOR:—The first question is, what estate passed by the will of Elizabeth Swane; the second is, whether the heir at law or the customary heir of Jonathan Trash is entitled to the copyhold estate in question.

1. With respect to the first point, the trust is to pay the rents to Jonathan Trash the father, during his life; and from and after his decease, to pay the residue to his children, and so on for ever, and for want of such children, over. A direction to pay to "children and so on for ever," must mean children's children, that is to say, issue; and "for want of such children," must mean for want of issue. The testatrix's object is, that children's children for ever shall enjoy the property in perpetual succession; and she makes no gift over whilst any such are left. There is no way of effecting this purpose, but by giving an estate tail to Jonathan Trash. If this be the meaning of the testatrix, as I think it is, the case is as nearly as possible the same as *Wood v. Baron*,<sup>(l)</sup> in which it was held that the first taker, the parent, took an estate tail.

2. The next question is, whether the heir at law or the customary heir of Jonathan Trash became entitled, upon his death, to this estate tail.

The custom of the manor is, that the youngest son is the customary heir. The copyhold tenants are trustees, and the estate tail is of the equitable interest. Equity, therefore, has to look for the heir; and the question is whether equity will not hold that person to be heir who would have inherited if

(a) See *Fitzgerald v. Field*, 1 Russ. 416.

(d) 2 Atk. 220.

(h) *Fearne Cont. Rem.* 377.

(k) 1 P. Wms. 54.

(b) Co. Litt. 12, b.

(e) *Willes*, 349.

(i) 1 Salk. 224; 1 Lord Raym. 203.

(l) 1 East, 259.

(c) 1 Black. 121; 1 Eden, 177

(g) *Willes*, 592.

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 1839.—*Rawson v. Samuel*.
 

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the estate had not been in trust. In *Edwin v. Thomas*(*a*) this was assumed. Chief Baron \*Gilbert, in his treatise on the Law of Uses [\*329] and Trusts,(*b*) states the rule generally as to all customary lands, as well as gavelkind and borough English, as to which it is not disputed that the equitable interests descend as the legal estate. In *Roberts v. Dixwell*,(*c*) Lord Hardwicke assumes that in trusts executed, as distinguished from trusts executory, the customary heir would be entitled. The distinction so taken leads to the consideration of the case of *Hale v. —*, decided in the year 1660, and mentioned by Lord Holt in *Clements v. Scudamore*,(*d*) in which it was held that a custom that the lands of a tenant dying seised descended to his youngest son, did not entitle the youngest son of a person whose lands had been surrendered to the use of him and *his heirs*, and who died before admittance, but that his common law heir was entitled. This case was relied upon in argument against the title of the youngest son here; but it was not a trust, and certainly not a trust executed. There was indeed a title in the father to be admitted; but that title was not complete when he died, and the decision seems to be founded upon the same principle as the rule referred to by Lord Hardwicke in *Roberts v. Dixwell*, that though the customary heir inherits in cases of trusts executed, yet the common law heir takes where the trust is executory. This case, therefore, does not appear to me to govern the present.

It was argued that the custom, as proved by the witness, does not include the present case, because the witness speaks of it as applicable to tenants *seised* of lands. It is not to be expected that the court rolls should furnish evidence of a custom applicable \*immediately to trust estates, [\*330] because all the transactions recorded in the court rolls are of transfers of the legal title. The title of the customary *hæres*, however, does not depend upon any custom as to equitable estates, but upon this, that the custom is proved to apply to legal estates, and that the descent of trusts executed follows the same rule.

I am therefore of opinion that the youngest son, being the customary heir, is in this case entitled to the land in question.

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### RAWSON v. SAMUEL.

1839; February 22.

If a defendant in his answer states portions of pleadings at law, but for greater certainty as to those pleadings refers to a copy thereof when produced, the plaintiff may, on a motion for an injunction, read the whole of such pleadings from a copy verified by affidavit.

ONE object of this suit was to restrain the defendant from proceeding in an action at law which he had brought against the plaintiff in equity for an

(*a*) 1 Vern. 489.

(*b*) Page, 19.

(*c*) 1 Atk. 610.

(*d*) 2 Lord Raymond, 1024; and 1 P. Wms. 66.

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 1838.—Saumarez v. Saumarez.
 

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alleged breach of an agreement. The bill set out a part of the pleadings at law. The defendant, by his answer, set out further parts of those pleadings, being portions of the declaration and pleas, and referred to them in these words:—"But for his greater certainty as to the said declaration and pleas, this defendant craves leave to refer to the same, or a proper copy thereof, when produced before this court."

Mr. *Knight Bruce*, upon a motion to show cause against dissolving the injunction which had been granted to restrain the action at law, insisted on his right to read, on the part of the plaintiff, a copy of the whole declaration and pleas, verified by affidavit; submitting that the defendant had by the effect of the reference incorporated them in his answer, and made them part

of his case. The same point, he said, had been decided by the  
 [\*331] Lord \*Chancellor in the *Skinnors' Company v. The Irish Society.*(a)

Mr. *Wigram*, *contra*.

THE LORD CHANCELLOR mentioned, as an analogous case, the court rolls of a manor admitted by the defendant, and in part referred to, and which could not be produced in court; and he allowed the verified copy of the pleadings at law to be read.

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 SAUMAREZ v. SAUMAREZ.

DE HAVILLAND v. SAUMAREZ.

1838: November 8, 9. 1839: January 25; November 18.

A testator gave and bequeathed to his son R. (who was his heir at law) his freehold land in D., and directed that the residue of the property which he might leave at his death, should be divided between that son and his two sisters in equal proportions; with a direction, that whatever portion might devolve to him should be placed in the names of trustees, and the interest paid to him during his life, and that after his death, his share should be divided between his children and placed in the names of trustees, with a discretionary power to employ a portion of the capital for their advancement; and on the children respectively attaining twenty-five, their shares to be transferred to them. Should his son die without issue, the whole of his portion was to devolve to his two sisters, during their lives, in equal proportions; and after their death, to their children; Held, first, that under the terms of this devise, the son took only a life estate in the freehold land in D.; and secondly, that, under the residuary clause, the reversion in fee of the land passed in equal undivided thirds, subject to the same trusts and limitations as the other residuary property, for the benefit of the testator's son and daughters, and their respective children.

THE will of Richard Saumarez, which was duly executed and attested to pass freehold estate, after expressing the testator's desire to make such a disposition of his property as might prevent disputes among those whom he left behind, directed that his wife should have the offer of his house and premises

for life, with the books, furniture, linen, china, plate, &c., at an annual rent of 150*l.*; which rent he desired should be \*equally divided  
 [\*332]

between his son Richard and his two daughters Carteret Gimingham and Martha de Havilland. He further directed that an inventory should be

(a) Not reported upon this point.



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1838.—Saumarez v. Saumarez.

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taken of the books, furniture, linen, china, plate, &c., and that after his wife's decease they should be appropriated to his said son and daughters; and in case his wife should decline the offer of renting the house, then his executors were to be at liberty to dispose of it, and were to divide the produce between his said son and daughters, subject to the conditions thereafter specified.

The testator then directed that the sums which he had put in settlement on the respective marriages of his said two daughters should be brought into hotchpot, and be accounted as part of the share, portion, or dividend which should accrue to them; or, in other words, that they should receive so much less of the residue of his estate as was equal to the sums which he had actually settled on their respective marriages.

The testator next made certain special provisions for two other sons, Frederick and Paul, who were both described as being of unsound mind. One of those provisions was introduced by a recital that it was given instead of the son "sharing with his brother Richard and sisters his share of my property equal to them."

The will then proceeded as follows:—"And as regards my son Richard, I give and bequeath to him the freehold land which I possess in Dorsetshire. And I direct that the residue of the property which I may leave at my death may be divided between him and his two sisters in equal proportions, the shares which they received as a marriage portion included, subject to the following restrictions:—It is my express direction that \*what- [\*333] ever portion may devolve to him shall be placed in the names of three trustees, the interest of which shall be paid to him during his life. And I direct that after his death the share belonging to him may be divided between his children, and placed in the names of trustees, with a power to employ the interest for their maintenance and education; and I give the said trustees a discretionary power to employ a portion of the capital, if it be found necessary, for their advancement and settlement in life; and after each of them has attained the age of twenty-five years, the whole of their share is to be transferred to them. As it is my wish that the wife of my son Richard should not have any control whatever over the property I leave to him my son her husband, or of his children after his death, I hereby direct my executors to reserve out of his portion a sum sufficient, after the death of her husband, to yield 75*l.* a year, payable to her half-yearly; and after her death, the capital to be divided between the children which my son may have left. Should my son Richard die without issue, the whole of the portion which may have been placed in trust for him is to devolve to his two sisters, during their life, in equal proportions, and after their death to their children. And in like manner if any of his children should die after him, and before they have attained the age of twenty-five years, such portion as they possess is to be divided between the surviving brothers and sisters; and in default of them, the whole is to go to the children of my daughters Martha and

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Carteret in equal proportions. And as to the sum which was placed in the names of trustees as a marriage settlement on my present wife, it is my will that after her death it should be divided in equal proportions between my son Richard and his two sisters, subject to the same trust as I have before directed, so that after the death of any of them without issue, such [\*334] proportion is to go to the \*surviving brother or sister; and after their decease, to their surviving children."

A subsequent passage in the will commenced with this recital:—"And whereas the advantages in the distribution of my property which I have given to my son Richard and to my two daughters, are founded on the unhappy state of my two sons Frederick and Paul," &c.

At the date of the will and at the time of his death, the testator was seised in fee of about 260 acres of freehold land in Dorsetshire, but he had no other real estate.

The bill in the first mentioned cause (*Saumarez v. Saumarez*,) was filed by the testator's son and heir at law, Richard Saumarez the younger, and his wife and infant children, as co-plaintiffs, against the executors of the will, and the testator's widow and younger children (including his two daughters,) and against the husbands and issue of the two daughters. It prayed that the trusts of the will might be performed, and the rights of all parties under it declared and secured.

By the order of the Master of the Rolls, made on further directions, it was, among other things, declared, under the testator's will, Richard Saumarez the younger was entitled to an estate for his life only in the freehold land in Dorsetshire, and that, under the residuary clause, he and his two sisters, Mrs. Gimingham and Mrs. De Havilland, were entitled to the reversion thereof in fee simple, subject to such life estate, in equal undivided third parts.

Richard Saumarez the younger appealed against this part of the order.

[\*335] \*Mr. Tinney and Mr. Romilly, in support of the appeal, argued that having regard to the general scope and context of the will, which obviously meant to deal with and distribute the whole of the testator's property, the appellant took a fee simple in the Dorsetshire estate; *Bradford v. Belfield*.<sup>(a)</sup> If, however, it should be held that no more than a life interest in that estate passed, the reversion in fee remained undisposed of, and devolved on the appellant in his character of heir at law. The testator never could have meant to pass that reversion by the general terms of the subsequent clause purporting to pass the residue of his property. The special limitations and directions, annexed to the residuary gift, referred only to personal estate, and were wholly inapplicable to a reversionary interest in land; and the word "property" must therefore necessarily be understood in

(a) 2 Sim. 264.

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a restricted sense, and not as comprehending the reversion in question; *Doe dem. Bunny v. Rout*,<sup>(a)</sup> *Roe dem. Helling v. Yeub.*<sup>(b)</sup>

Mr. *Simpkinson* and Mr. *Purvis*, for Mrs. *Gimingham*, and Mrs. *De Havilland*, contended that the appellant took only a life estate in the land in Dorsetshire, and that the reversion passed under the residuary clause. In support of their argument, they cited and commented upon *Doe dem. Spearling v. Buckner*,<sup>(c)</sup> *Doe dem. Andrew v. Lainchbury*,<sup>(d)</sup> *Doe dem. Wall v. Langlands*,<sup>(e)</sup> *Nicholls v. Butcher*,<sup>(g)</sup> *Pattan v. Randall*,<sup>(h)</sup> *Doe dem. Morgan v. Morgan*;<sup>(i)</sup> and they denied the authority of *Doe dem. Helling v. Yeud*.

\*Mr. *Anderdon*, for the children of Mrs. *Gimingham* and Mrs. [\*336] *De Havilland*, and Mr. *Koe* for the children of the appellant, followed the same line of argument. They further submitted, (though, as the children had not appealed, the objection was not in strictness open,) that that part of the order which declared the appellant and his two sisters to be entitled in equal thirds to the reversion in fee of the Dorsetshire estate, was clearly erroneous. This appeared to have been a mere slip in drawing up the order, for the question was never discussed; and it was obvious that if the reversion passed, as the Master of the Rolls had decided, under the residuary clause, it could only pass subject to the same trusts and limitations, as the other property comprised in that clause.

Mr. *Tinney*, in reply, observed that the respondents' construction seemed to involve this absurdity, viz. that it made the testator, first, in express terms, devise to his son Richard a life interest in the land, and then, after the determination of that estate, give him by virtue of the residuary clause a life interest in the reversion, jointly with his two sisters.

THE LORD CHANCELLOR said that, as the present record was framed, it would be quite irregular to make any adjudication on the point raised by the appeal; the interests of the appellant's children, who joined with him as co-plaintiffs in the suit, being directly at variance with his own. The proper course would be to vary the order of the court below, by striking out so much of it as related to the testator's real estate, and to let a new bill be filed, in which the parties should be properly arranged for the purpose of conveniently raising the question as to the real estate, and solely confined to that object. If such a course were taken, so as to put the pleadings \*right in point of form, the cause might, as soon as it was at is- [\*337] sue, be set down before him and called on for hearing, *pro forma*; but probably it would not be thought necessary, after the full discussion which the question had just undergone, that it should be again argued.

Agreeably to his lordship's suggestion, a bill was accordingly filed (being

(a) 7 Taunt. 79.

(b) 2 New Rep. 214.

(c) 6 T. R. 610.

(d) 11 East, 290.

(e) 14 East, 370.

(g) 18 Ves. 193.

(h) 1 J. &amp; W. 189.

(i) 6 B. &amp; C. 512.

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 1838.—*Saumarez v. Saumarez.*


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the cause of *De Havilland v. Saumarez*) by the testator's two daughters and their respective husbands, against Richard Saumarez the younger and his infant children, simply raising the question as to the title to the real estate.

This bill alleged that the defendant Richard Saumarez the younger claimed to be the owner in fee of the Dorsetshire estate, and intended, as such, to cut down the timber growing thereon. Richard Saumarez the younger, by his answer, claimed the estate in fee simple, either by force of the devise, or as taking a life estate, under the will, and the reversion by his title of heir at law; and he admitted his intention to cut down the timber.

1839: Jan. 25.—The cause of *De Havilland v. Saumarez* was brought on for hearing before the Lord Chancellor; but the counsel for the different parties merely stated the question to the court, and left it to his lordship's decision, upon the arguments already urged on the appeal.

Nov. 18.—THE LORD CHANCELLOR:—The defendant the heir at law claims the fee of the lands devised, either as devisee or as heir. As  
 [\*338] devisee he has no title, except for his life, the devise to him "being  
 "of the freehold land which the testator possessed in Dorsetshire," without any words of inheritance.

The question is, whether the fee of these lands, subject to the defendant's life estate, is undisposed of, or passed under the next clause in the will, by which the testator directed that the residue of the property, which he might leave at his death, should be divided between his son and his two daughters in equal proportions.

If this had been the whole of the case, there would have been no doubt. The testator, in that case, having given a life estate in his lands, would have devised the residue of his property, that is, all his property not before disposed of, which would have included the fee of that land in which he had before only given a life estate. But the difficulty is, that, in directing the application of such residue of his property, he has used expressions and prescribed a course of dealing not applicable to land, but to personalty only. He directs his son's share to be *placed* in the names of trustees, and the interest to be paid to him, who was already tenant for life of the land; and he authorizes his trustees in certain cases to advance part of the *capital*, and directs them, in certain other cases, to transfer the whole; and he calls the son's share of such residue a *portion*.

The question then is whether such expressions and directions are sufficient to give a restricted meaning to the gift of the residue of his property, and to confine these words (sufficient of themselves to pass freehold as well as personal property,) to passing the personal property only.

Before referring to the authorities upon this point, it seems desirable  
 [\*339] to consider what ought in reason to be the construction. In considering gifts of residue, whether of real or personal estate, it is

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 1839.—Saumarez v. Saumarez.
 

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not necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed, such gifts may be introduced to guard against the testator having overlooked some property or interest in the gifts particularly described. If he meant to give the residue of his property, be it what it may, it is immaterial whether he did or did not know what would be included in it; and if so, it cannot make any difference that such ignorance is manifested upon the face of the will, unless the expressions manifesting it are sufficient to prove that the testator did not intend to use the words of gift in their ordinary, extended, and technical sense.

In the present case, if it be assumed that the testator was aware that the first gift to the son would only confer upon him a life estate, because such is the legal import of the words used, it must, for the same reason, be assumed that he was aware that the gift of the residue of his property would pass the fee in the lands. It is, however, very probable that he was not aware that the son would only take a life estate; but it is not inconsistent with such an impression that he should wish that the residuary clause should carry all that he had not before disposed of.

In the case of a devise to persons filling a particular character, or to persons not *in esse* at the testator's death, the intermediate rents pass by a residuary devise, although there is no probability that the testator contemplated any such interest passing. This is totally different from cases of lapsed devises, or devises void at law, the devise of the residue operating, and being supposed or intended to operate, upon what had not been included in any former devise. And as it cannot be \*assumed that the testa- [\*340] tor here intended to give the fee to his son by words which, at law, will only carry an estate for life, it must be assumed that he intended it to pass by words which include all that he had not before disposed of. What he had not disposed of consisted of the fee of these lands, subject to his son's life estate, and of his personal property. The circumstance of his using expressions and giving directions applicable only to the personal estate, may prove that he did not at the time consider, or was not aware, that this fee would be part of his residue: but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the operation of the general intent of passing all the residue of his property.

In *Roe dem. James v. Avis*, (a) the court seems to have proceeded upon the supposed proof of the absence of any intention to pass the property in contest; but in *Church v. Mundy*, (b) Lord Eldon pointed out the inaccuracy of such a principle, and states (in which I entirely concur) that the best rule is, to take the words to comprehend a subject which falls within their usual sense, unless there is something like a declaration plain to the contrary. In *Doe dem. Morgan v. Morgan*, (c) Mr. Justice Bayley laid down the rule, and I think rightly, that if there are other expressions in the will calcu-

(a) 4 T. R. 605.

(b) 15 Ves. 296. See p. 406.

(c) 6 B. &amp; C. 516.



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 1839.—Saumarez v. Saumarez.
 

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lated to raise a judicial doubt only, whether the testator intended to confine the word *property* to his *personal* estate, those expressions ought not to control the effect of the word *property*, which had been held to include the real as well as personal estate.

[\*341] \*The decisions in *Doe dem. Spearing v. Buckner*,(a) and *Doe dem. Burkett v. Chapman*,(b) show the difficulty of laying down any satisfactory rule in dealing with limitations inapplicable to particular estates; but, adhering to the principle laid down by Lord Eldon in *Church v. Mundy*, I find here a residuary clause in words amply sufficient to comprehend the subject in question, and I do not find any declaration plain, that the testator intended to use them in a sense different from their usual meaning. The expressions used in this case, and the directions given, are addressed to all the property given by the residuary clause, but are applicable only to the residue of the personal estate, and not to the fee of the lands devised to the son for life. So in *Doe dem. Earl Cholmondeley v. Weatherby*,(c) and *Doe dem. Nethercote v. Bartle*,(d) the limitations were in terms addressed to all the estates, but were inapplicable to some:—nevertheless all were held to pass.

In many of the cases much stress has been laid upon expressions indicating an intention to dispose of the whole of the testator's property. No such general expressions are to be found here; but there are passages in other parts of the will clearly indicating such an intention in the testator's mind. He speaks of a daughter having "so much less of the residue of my estate," and of a son not "sharing with his brother and sisters his share of my property equal to them."

I am therefore of opinion, that the Master of the Rolls put a right construction upon this will, in holding that the reversion of the Dorsetshire estate passed under the residuary clause; but I think it must be subject to  
 [\*342] the \*same trusts and limitations as the rest of the property comprised in that clause.

The declaration will be accordingly: the costs must come out of the estate.[1]

(a) 6 T. R. 610.

(b) 1 H. Bl. 223.

(c) 11 East, 322.

(d) 5 B. & Ald. 432.

[1] The testator after giving at the commencement of his will, various pecuniary legacies, and bequeathing all the rest and residue of his ready money, securities for money, and moneys in the funds, to trustees upon certain trusts, concluded his will as follows:—"And I do further give and bequeath to my said wife all my jewels, &c. &c., and other goods, chattels and effects whatsoever, as her own goods and chattels forever; and I do hereby constitute and appoint her my said wife, sole executor of this my will;" it was held that this clause carried the residue of the testator's property to the wife. Knight Bruce, V. C. "The first point upon the will that it may be right to mention, is the question, whether the testator has disposed of the beneficial interest in the general residue of his personal estate, or has so far died intestate. This turns upon the meaning to be attributed to the words "goods, chattels and effects," having regard to the position in which they are found in the will; and having regard also, to the whole contents of the will. Lord Cottenham in *Saumarez v. Saumarez*, expressed his assent, and I agree with him in assenting, to a general rule of construction, as laid down or recognized by Lord Eldon in *Church v. Mundy*, (15 Ves. 406,)



1839.—Nye v. Maule.

## NYE v. MAULE.

1839: May 21.

The plaintiffs claimed, as next of kin of an intestate, a fund which was in the possession of the defendant as the nominee of the Crown, and after the master had reported against the plaintiffs' title, the court directed certain issues for the purpose of trying it. The plaintiffs applied for an advance out of the fund, to enable them to try the issues; but this, which was opposed by the Crown, the court refused.

THE plaintiffs claimed, as next of kin of two persons named Sarah Hyatt and Edward Smith, to be entitled to a fund of which the defendant Maule had obtained possession. Hyatt had been the surviving executrix of Smith, and upon her death intestate and without issue, letters of administration of her estate and effects, and also of the unadministered estate and effects of Smith, were granted to Maule, as the nominee and on behalf of the Crown. At the hearing of the cause, the plaintiffs entered into no evidence; but a decree was made, directing the master to inquire and state who were the next of kin of Hyatt and Smith respectively.

The master having reported that Robert Collins and Mary Harrison, neither of whom was a party to the cause, were the next of kin of Hyatt, and that no person had made out a title before him as next of kin of Smith, the plaintiffs took exceptions to the report. On the hearing of those exceptions, four issues were directed, for the purpose of trying—first, whether the plaintiffs or any of them were of kin to Smith; secondly, whether the plaintiffs or any

thus:—‘It is much more safe to consider those subjects intended which the words describe, than to supply a purpose by conjecture; determining for the testator upon the more or less convenience with which that subject may be, which he has declared shall be, applied. The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary.’ The words ‘goods, chattels and effects,’ which the bequest contended to be residuary contains, or any of them, are terms that, in their proper sense and nature, are sufficiently large to include and pass the absolute interest in the whole personal estate. But a will may be so worded as to show that, according to a reasonable construction of it, the testator must have intended to use those terms in a limited and restricted sense; and when this appears, the intention so collected must have effect given to it. It is however incumbent on those who contend for the limited construction to show that a rational interpretation of the will requires a departure from that which, ordinarily and *prima facie*, is the sense and meaning of the words. Such I take to be in substance, the rule to be collected from all the authorities, and to this test the gift in question must be subjected.” After referring to, and commenting upon the cases of *Arnold v. Arnold*, 2 Myl. & K. 372, 373; *Campbell v. Prescott*, 15 Ves. 517, and *Michell v. Michell*, 5 Madd. 71, 72; the Vice-Chancellor proceeds:—“Acknowledging as I do, the principles recognized in those three cases and in *Church v. Mundy*, and recollecting particularly, that *prima facie* the words “goods, chattels and effects,” are general and unlimited expressions as applied to personalty, what judicial ground have I for saying, that an intention to use them in any other sense is apparent on this will? Conceiving the general interpretation to be not only consistent with propriety of language and expression, but to be at least as probably conformable with the testator’s views, and intentions to be collected from the whole will, as any other construction, I consider myself not authorized to depart from it; and therefore, not authorized to concede to the argument which contends against the wife’s right to the residue.” *Parker v. Marchant*, 1 Yo. & Coll. C. C. 290, 300, 303. And see *Willis v. Hiscox*, ante 197. *Blagge v. Miles*, 1 Story’s Rep. 455.

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 1839.—Nye v. Maule.
 

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of them were of kin to Hyatt; thirdly, whether the plaintiffs or any of them were descended from the great grandfather of Smith; and, fourthly, whether Collins and Harrison were of kin to Hyatt. The plaintiffs [\*343] in equity were directed to be plaintiffs \*on the trial of the three first issues, and, together with Maule, to be defendants in the fourth; and for the purpose of enabling the different parties, including Collins and Harrison, to proceed to the trial of the issues, certain sums, amounting in the whole to 800*l.* were ordered to be paid to their respective solicitors out of the fund in court in the cause, viz. 250*l.* to the solicitor of the plaintiffs, 250*l.* to the solicitor of Collins and Harrison, and 300*l.* to the solicitor of the defendant, upon their respectively undertaking to account.

The fourth issue afterwards came on for trial, when the jury found that Collins and Harrison were not of kin to Sarah Hyatt.

The plaintiffs in the suit thereupon presented a petition, stating that they had not yet proceeded to the trial of the other issues, but that, under the former order, they had received 250*l.* out of court, towards their costs; that they had already incurred upwards of 250*l.* costs on the trial of the fourth issue, as well as a very large amount of costs in prosecuting the suit; that they were unable, for want of means, to meet the expenses of the trial of the remaining issues; and they prayed that a further sum of 500*l.* might be advanced to their solicitor for that purpose, out of the fund.

The Vice-Chancellor made an order, upon this petition, that 500*l.* should be paid to the solicitor of the plaintiffs, and 300*l.* to the solicitor of the defendant, upon such solicitors respectively undertaking to account for those respective sums.

The defendant, who had not applied for any advance, appealed from the last mentioned order.

The *Solicitor General* and Mr. *Wray*, in support of the appeal. [\*344] —“The order is unprecedented and improper; the parties who obtained it have not yet established even a *prima facie* title as next of kin. The practice of treating property of this description, which, for default of heirs or next of kin, has vested in the Crown, as a fund for the maintenance of litigation and the encouragement of speculative and desperate claims, is most pernicious; and the defendant, the solicitor to the treasury, being a mere stakeholder for the persons really entitled, who may not be before the court, has been advised and has determined to resist it. Any orders of a similar kind, which may have been made in other cases, have been made by consent, or at all events have not been opposed, and are therefore no authority for the present order.

Mr. *Wigram* and Mr. *Teed, contra.*—The plaintiffs have a good case, but are prevented from making it out by want of the funds which the Crown now holds in its possession in the name of its agent, the defendant Maule. They have already obtained a decree which entitled them to go in and establish their claims before the master; and exceptions having been taken to the re-

1839—*Stedman v. Webb*.

port, which was unfavorable to their claim, the court has directed several issues for the purpose of trying their title. They have succeeded in one of those issues,—the only one which has yet been tried; but much additional expense must be unavoidably incurred in going to trial of the other issues. Similar orders have been made in *Monkton v. The Attorney General*, *Freeman v. Fairlie* and *Cockrell and Barber*; (a) and in this very case two sums of 250*l.* \*each have been already advanced out of the fund [\*345] to the solicitors of the several claimants, with a view to provide for the costs of these issues, upon the undertaking of the solicitors to account for the money.

THE LORD CHANCELLOR:—I have always considered, that what has been done by the court in cases of this kind, has gone a great deal too far, and has been productive of much useless litigation, without any corresponding benefit; for it necessarily encourages the prosecution of hopeless claims. It is true that, in *Monkton v. Attorney General* and several other cases, similar orders have been made; but they have generally been unopposed or taken by consent; and, in those cases, very large sums of money have been wasted in fruitless litigation. Here, however, the plaintiffs stand in a far less favorable position. They entered into no evidence, at the hearing, in support of their claim; and the master's report was actually against them, so that, as far as the litigation has proceeded, they are absolutely without any title at all.

If the order had been that the money might be advanced to the plaintiff's solicitor, upon his undertaking to repay it, in case the plaintiffs had costs awarded against them, perhaps the advisers of the Crown might not have objected to it. As it is, however, and in the absence of the defendant's consent, the order must, I think, be discharged; and I come to this conclusion with less reluctance, because it is only in desperate cases, where there is no chance of success, that a party can, at the present day, have any difficulty in obtaining the means wherewith to carry on legal proceedings, for the purpose of substantiating a valuable claim.(1)

\*STEDMAN v WEBB.

[\*346]

1839; March 8, 9, 13.

On a bill filed by a solicitor, seeking to establish a lien for costs upon a policy of assurance which a client had placed in his hands professionally, and upon which the court had in another cause directed an action to be brought, a special injunction was obtained, restraining all proceedings upon the policy; but this injunction was dissolved upon appeal; the Lord Chancellor holding that the plaintiff's proper course was to make an application in the other cause. Whether such a lien could be enforced by suit; and if so, to what extent, *quære*?

(a) None of these cases are reported upon this point; but see *Perishal v. Squire*, 1 Dick. 31; *Gregg v. Taylor*, 4 Russ. 279; [282, n. 1;] *Peck v. Beechey*, 2 Sim. 40; [n. 1, 2, *ibid.*]

[1] In *Johnston v. Todd*, 3 Beav. 216, a similar application was refused, and Lord Langdale, M. R., strongly expressed his disapprobation of the practice.

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1839.—*Stedman v. Webb*.

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THE plaintiff in this suit was a solicitor, seeking to establish a lien for costs upon two policies of assurance, one for 500*l.* and the other for 150*l.*, effected with the Sun Life Assurance Company; and also upon a bond, and upon certain indentures which purported to assign and mortgage the moneys recoverable in respect of the policies.

The defendants were Sophia Frances Webb, Margaretta Cordelia Edge, Charles Pole, Elizabeth Warburton, and Elizabeth Mary Morgan Cobb Warburton.

The short outline of the case, as it appeared on the plaintiff's affidavit in support of his bill, was, that the policies and other instruments in question were held by the defendant Margaretta C. Edge, as administratrix of the estate of her father Andrew Edge, by way of security for a debt due from one Dr. Watson, upon whose life the policies were effected; that in May, 1833, the defendants Elizabeth Warburton and Elizabeth M. M. C. Warburton, instituted a suit in chancery against Andrew Edge (which, upon his death in 1834, was revived and prosecuted against his personal representative,) for the purpose of obtaining an account against him in his character of trustee of the estate of one Phillip Warburton deceased: that Dr. Watson died in April, 1837, leaving the defendant Sophia Frances Webb his personal representative; and that the plaintiff thereupon received the money payable in respect of the 150*l.* policy, and, with the privity and assent of Margaretta C. Edge, retained the amount in part \*payment of what was due to him for his after-mentioned bills of costs: that in July, 1838, a decree was made in the cause of *Warburton v. Edge*, by which, among other things, a receiver was ordered to be appointed of the estate of Andrew Edge, and by which Margaretta C. Edge was restrained by injunction from receiving the money payable upon the 500*l.* policy, and also from getting in any other moneys belonging to her father's estate: that the plaintiff had for many years acted as the attorney and solicitor of Andrew Edge, and afterwards of Margaretta C. Edge, in defending the suit of *Warburton v. Edge*, and in other professional business on their behalf: that Margaretta C. Edge, as administratrix of Andrew Edge, deposited with the plaintiff the policies and other instruments in question, and that his estate was now indebted to the plaintiff in the sum of 682*l.* in respect of his bills of costs for such professional business as aforesaid; that Margaretta C. Edge had made application to the Sun Assurance Office for payment of the 500*l.* policy, and intended to appropriate the proceeds to her own use; that the plaintiffs in *Warburton v. Edge* had, in that cause, presented a petition which was still pending, and which prayed that the plaintiff might be ordered to deliver up to the receiver in the cause all deeds and documents in his custody or power relating to or being part of the estate of Andrew Edge, and in case he claimed any lien thereon, that the master might inquire into the validity and extent of such lien: that on the 29th of November, 1838. the defendant Sophia F. Webb, the administratrix of Dr. Watson, commenced an action against

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the defendant Pole, as the chairman of the Sun Life Assurance Company, for the recovery of the 500*l.* due upon the policy; and that the attorneys for the plaintiff in that action had served the plaintiff in this cause with a notice to produce the \*policy and the indenture assigning it before [\*348] a judge at chambers.

The bill charged that the plaintiff was entitled to a lien upon the two policies, the indentures, and the bond, and also to a lien upon all moneys recoverable and secured by those several instruments for the sum of 682*l.*, the amount due to him in respect of his bills of costs; and that if the defendants Sophia F. Webb, Margaretta C. Edge, Elizabeth Warburton, and Elizabeth M. M. C. Warburton, or any of them, obtained possession of the sum of 500*l.*, the plaintiff would be entirely deprived of all means of recovering thereout any part of his demand.

The bill prayed that the plaintiff's lien upon the policies of assurance, the indentures, and bond, and upon the moneys secured by or recoverable under them, might be declared and secured; and that, in the meantime, the defendants might be respectively restrained from paying over or receiving, and from taking any legal proceedings to recover the moneys due upon the 500*l.* policy.

The Vice-Chancellor, on the filing of the bill supported by the plaintiff's affidavit, made an *ex parte* order, restraining the defendant Webb by injunction from taking or prosecuting legal proceedings against any other person than the plaintiff, for the recovery of the money payable on the 500*l.* policy, and also restraining the defendants Pole and M. C. Edge from paying, transferring, or assigning such money to the defendant Webb. And his honor afterwards, upon a motion made on behalf of the defendants Elizabeth Warburton and Elizabeth M. M. C. Warburton, and supported by the \*affidavit of their solicitor, to dissolve that injunction, refused the ap- [\*349] plication with costs.

It appeared from the last mentioned affidavit, that the action, though brought in the name of Sophia F. Webb, was really carried on by the receiver, acting under the direction of the court, in the cause of *Warburton v. Edge*.

The motion was now renewed, by way of appeal, before the Lord Chancellor.

Mr. *Wakefield* and Mr. *Anderdon*, for the motion, submitted that the injunction, like the bill itself, was unprecedented and unwarrantable. The ordinary lien of a solicitor for his costs upon the deeds and papers of his client in his possession, was a lien that enabled him passively to hold the documents, but it did not, like the lien of an equitable mortgagee, created by deposit, entitle him to realize the property comprised in them; *Worrall v. Harford* : (a) as little did it entitle him to maintain a suit to have his lien declared and secured by a decree. Regularly, all questions as to the extent and

(a) 8 Ves. 4.



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validity of such a lien, could only be raised and decided collaterally in the course of any proceedings in which the client sought to establish his rights by means of the documents alleged to be subject to the lien, and not by a distinct and independent proceeding. In this very case, the plaintiff's claim might have been properly tried and determined, either in the action, upon an application to the judge at chambers, or upon the pending petition in the cause of *Warburton v. Edge*. This bill was therefore quite improper, and might have been successfully demurred to. It was a mistake to suppose

that a solicitor had a general lien for his costs upon the funds [\*350] \*which, by means of deeds in his possession, his client was enabled to recover. The loose extra-judicial *dicta* of Sir Thomas Plumer in *Worrall v. Johnson*,<sup>(a)</sup> which had been sometimes supposed to favor that notion, had never been approved, and were directly opposed to the principle of the latter cases; *Lann v. Church*,<sup>(b)</sup> *Hodgens v. Kelly*.<sup>(c)</sup>

Mr. *Jacob*, Mr. *Wigram*, and Mr. *Torriano*, in support of the injunction, referred to *Turwin v. Gibson*,<sup>(d)</sup> *Ex parte Pemberton*,<sup>(e)</sup> — *v. Bolton*;<sup>(g)</sup> and they relied strongly upon the observations of Sir Thomas Plumer, in pronouncing judgment in the case of *Worrall v. Johnson*. Those observations, they contended, had never been impeached by any subsequent judge, and were a direct authority for the present bill, and for the order which the Vice-Chancellor had made.

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*March 13.*—THE LORD CHANCELLOR [after stating the circumstances]:—That the plaintiff as a professional man, and himself employed in the cause, must have been well aware of the fact, that the action in the name of Webb was brought by the receiver in the cause of *Warburton v. Edge*, for the purpose of calling in the estate of Edge, I cannot, upon the affidavits, entertain the smallest doubt. Now, if he had any claim against any portion of Edge's estate, the remedy was open to him. He had nothing to do but to make an application in the suit of *Warburton v. Edge*, in which he had acted as the solicitor of one of the parties; but instead of that, he files [\*351] the present bill, the object of which is to enforce this \*lien; and he applies for and gets an *ex parte* injunction to restrain the action for the recovery of the insurance money.

In the affidavit filed for the purpose of obtaining that injunction, the plaintiff does not very distinctly state the ground on which he puts his lien. The Vice-Chancellor, I understand, rested it upon the ground of contract, considering the affidavit to be so expressed as to import a lien by contract, in the nature of an equitable mortgage by deposit; but, upon looking at the language of the affidavit, I do not think it can bear that interpretation. It is this,—that “Margaretta C. Edge, as such administratrix as aforesaid, deposited with the plaintiff, as such solicitor and attorney as aforesaid, all and

(a) 2 J. &amp; W. 214.

(d) 3 Atk. 720.

(b) 4 Mad. 391.

(e) 18 Ves. 282.

(c) 1 Hogan, 388.

(g) Ibid. 292.



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singular the policies, instruments, and documents" in the bill mentioned. That is the whole of the allegation; simply a statement of the fact of these documents having been deposited with the plaintiff as the solicitor of the party, and of their being in his custody. Now, if a party comes before the court *ex parte* for a special injunction, it is necessary that he should distinctly state the grounds upon which he puts his case. A deposit by contract would constitute a totally different title from a mere holding by a solicitor in the course of business. And as the plaintiff has not at all altered his case in that respect, on the appeal, and there is now no evidence before me of any contract between him and Miss Edge, the case is rested simply on the fact of the solicitor having, in the prosecution of a suit, a certain document in his hands; and the question is, what right such a deposit gives to the solicitor. If the Vice-Chancellor conceived that the language of the affidavit was such as imported or might give a lien by contract, his honor had before him a different case from that which is now under my consideration.

"The title assumed by the plaintiff in this; that whereas he, being [\*352] a solicitor, has in his possession a deed which is necessary to enable the party entitled, and under whom he claims, to recover the money secured by it, that circumstance gives him a lien upon the fund itself, and if a lien, then also a right to enforce it by suit.

The only case referred to in support of that proposition is *Worrall v. Johnson*.(a) Now in that case it is to be observed there was no decision upon the point, and that what was there said by Sir Thomas Plumer was not the ground of his judgment. His honor there only laid it down, that where, in the progress of a suit, a solicitor has a lien upon a particular deed belonging to his client, and has been himself instrumental in realizing the fund to the client, the lien should be extended to the money which is the fruit of the deed, and which could only be recovered through the medium of the deed.

How far that proposition is universally to be admitted, it is not necessary for me now to consider. It is enough for the present purpose to remark, that what Sir Thomas Plumer is represented to have said in *Worrall v. Johnson* cannot be any authority for the plaintiff's claim in this case; for the whole of Sir Thomas Plumer's observations proceed upon the assumption that the fund has been realized by the use of the document, and could not have been realized without it. That very ground displaces the plaintiff's title here. If the document withheld was the assignment, then the plaintiff had in his own hands the best possible injunction: if, on the other hand, it was not a document necessary for the recovery of the money, and a payment might validly be made in defiance of his claim,—if the plaintiffs in the cause of *Warburton v. Edge* were in a condition to compel [\*353] payment without the production of the document, then the observations of Sir Thomas Plumer in *Worrall v. Johnson* have no application.

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 1839.—Bozon v. Bolland.
 

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The Vice-Chancellor granted the injunction *ex parte* ; and he afterwards refused with costs a motion to dissolve it ; and the effect of the order, as it stands, is, that the money in the hands of the assurance company is not to be received by any body ; that neither the parties who are legally, nor those who are beneficially entitled, shall be permitted to receive it. The result is, that the fund is to remain in the hands of the debtor : and it is not very easy to say at what time events are to happen which shall give to any of the parties a right to proceed for its recovery. At all events, the injunction prevents any of the parties from having interest, which must in the mean time be lost, and that, to the gain of the debtor. It is obvious that the consequence of such an order might in many instances be most dangerous and unjust.

That the order cannot stand as pronounced, is not now disputed on either side ; and when I look to the plaintiff's title, and the grounds on which he has rested it, I am very clearly of opinion that he is not entitled to an injunction. If he has any claim upon the money secured by the policies, an obvious course was open to him, namely, by application in the other suit ; but he has not thought proper to adopt that course.

I have looked through the affidavit upon which the injunction was obtained for the purpose of seeing whether the plaintiff so misrepresented the facts of his case as to subject him to the penalty of having the injunction [\*354] dissolved with costs ; but although such was my impression at first, I have, on a more careful examination, come to a contrary conclusion ; for it appears to me that all the material facts are stated in his affidavit, and were therefore brought to the knowledge of the court at the time when the injunction was applied for.

The order, therefore, will now be simply to discharge the Vice-Chancellor's order, and dissolve the injunction.(a)

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 BOZON v. BOLLAND.

HUSBAND v. BOLLAND.

1839 : August 8 ; November 12.

If a solicitor, whom his client has ceased to employ, by the production of a deed in his hands belonging to the client, and upon which he claims a lien as solicitor, enables the client to recover a fund in a suit, his lien over the fund so realized is confined to the costs of that suit, but is a lien which he is entitled actively to enforce. *Secus* as to his general lien upon his client's papers, which applies to all his bills of costs, but is merely a right to retain the papers, and cannot be actively enforced.

THE single question in this case was, whether, when a solicitor, having in his hands a deed belonging to his client, has produced it in a suit, and the client has, by means of the deed so produced, established his title to the fund which was the subject of the suit, the solicitor is entitled to a lien upon the

(a) See *Bozon v. Bolland*, the next case.

1839.—Bozon v. Bolland.

fund so recovered for the amount of his costs generally, or only for his costs of that suit.

The particular circumstances of the case, and the mode in which the question came before the court, are fully stated in the judgment.

*The Solicitor General* and *Mr. Hull*, for the assignees of *Mr. Cole*, the former solicitor of *Mr. Bozon*, argued, that upon the principles to be deduced from the authorities, the benefit of the solicitor's lien upon the fund recovered in the cause extended to the amount due in respect of his [\*355] general bills of costs. They relied mainly upon the observations of *Sir Thomas Plumer* in his judgment in the case of *Worrall v. Johnson*,<sup>(a)</sup> and submitted that here the fund was the fruit of the deed.

*Mr. Wigram* and *Mr. Bethell*, for the assignees of *Mr. Bozon*, on the other hand contended, that according to the true principle of the cases, the solicitor's lien upon the fund which is realized in a suit by the aid of his professional services, or by the production of a document in his hands, must be strictly confined to such costs as have been incurred in the suit itself. The dicta of *Sir Thomas Plumer* in the case referred to, which were merely extra-judicial, had been doubted, if not disapproved by the court in the recent case of *Stedman v. Webb*,<sup>(b)</sup> and could not be considered as entitled to any weight.

In the course of the argument the following cases were also cited and made the subject of comment;—*Ex parte Sterling*,<sup>(c)</sup> *Ex parte Pember-ton*,<sup>(d)</sup> *Ross v. Laughton*,<sup>(e)</sup> *Commerell v. Poynton*,<sup>(g)</sup> *Lann v. Church*,<sup>(h)</sup> *Brassington v. Brassington*,<sup>(i)</sup> *Heslop v. Metcalf*,<sup>(k)</sup> *Bozon v. Williams*.<sup>(l)</sup>

**Nov. 12.—THE LORD CHANCELLOR :—**By the proceedings in these suits, the title of *Mr. Bozon* the plaintiff in the first suit, and of the plaintiffs in the second suit, who claim under him, has been established [\*356] to a sum of 2935*l.* 13*s.* 5*d.* now in court, under a deed of the 20th of May, 1820, assigning the arrears of an annuity to *Mr. Bozon*.

*Mr. Cole* was employed as solicitor by *Mr. Bozon*, and for some time acted as his solicitor in these causes, but was discharged in the year 1830. He was also employed by *Mr. Bozon* in other matters; and on both accounts bills of costs became due to him.

*Mr. Cole* having, as such solicitor, possession of the deed of assignment of the 20th of May, 1820, produced it as evidence in the cause, to establish the plaintiff's title, though not then employed as solicitor. A taxation of all *Mr. Cole's* bills having been directed, and he having become bankrupt, his assignees presented a petition at the Rolls, claiming a lien upon the fund in court for the whole of such costs; and by an order of the 9th of June, 1837,

(a) 2 J. & W. 214.

(d) 18 Ves. 282.

(b) 4 Mad. 391.

(l) 3 Y. & Jer. 150.

(b) Page 346, supra.

(e) 1 Ves. & B. 349.

(i) 1 Sim. & St. 455.

(c) 16 Ves. 258.

(g) 1 Swan. 1.

(k) 3 Mylne & Craig, 183.

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 1839.—Bozon v. Bolland.
 

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a stop was put upon that fund. By my order of the 13th of April, 1839, I directed the master to make a separate certificate of Mr. Cole's costs in these suits. This has now been done, and such costs have been taxed at 99*l.* 14*s.* 2*d.*

The petitioners, the plaintiffs in the second suit, ask to have the whole fund paid to them, or subject only to the payment of the 99*l.* 14*s.* 2*d.*; and that Mr. Cole's assignees may pay the costs of the petitions and orders of the 9th of June, 1837, and 13th of April, 1839, and of the present petition and order, and of the taxation. Mr. Cole's assignees, on the other hand, claim a lien upon the fund in court for the whole of his bills of costs, upon the ground that he had a lien upon the deed of the 20th of May, 1820; and that the title to the fund in court was established by his production of that deed, and that he, therefore, is entitled to the same lien upon the fund as he was entitled to upon the deed.

[\*357] \*This is the only question; because the lien of Mr. Cole for payment of his bills of costs in these causes cannot be disputed. The question as to the lien claimed for the other parts of his bills of costs, for matters other than the costs of these causes, appears to me to have acquired importance solely from the observations of Sir Thomas Plumer in *Worrall v. Johnson*.(a) In that case the plaintiff's title was as assignee of a person who had been in partnership with the defendants. The balance due from the defendants to the assignees was admitted and paid into court, and the suit was afterwards compromised; and the fund in question was agreed by the defendants to be paid to the plaintiffs. Before the transfer, the plaintiffs became bankrupt; and their solicitors claimed a lien not only for the costs of the suit, but for the general costs due from the plaintiffs, upon the ground that they had in their hands the deed of assignment under which the plaintiffs claimed; and Sir Thomas Plumer gave effect to the claim, saying, "The principle I go on is, that the papers which give to the solicitor this right must be considered as giving the same right after the suit has been prosecuted with success, as when they were antecedently in his hands. The money here is the fruit of this deed, and it can only be received through the medium of the deed."

It appears to me, that in these observations the distinction between the solicitor's lien upon the fund realized in the cause, and his lien upon, or rather right to retain, his client's papers in his hands as solicitor, is not sufficiently kept in view. The lien upon the fund realized in the suit is confined to the costs of that suit; *Lann v. Church*;(b) although that seemed to be doubted in *Worrall v. Johnson*. This is a lien which the solicitor is

[\*358] \*entitled actively to enforce. If this were the whole ground of the claim of the assignees of Mr. Cole, such claim could not exceed the 99*l.* 14*s.* 2*d.*, the costs in the cause.

(a) 2 J. &amp; W. 214.

(b) 4 Mad. 391.

1839.—Bozon v. Bolland.

The solicitor's lien upon or right to retain his client's papers till his bill is paid is of a nature totally different. It applies to all his bills of costs; but he cannot actively enforce it. So long as the client leaves the papers in the solicitor's hands, the solicitor's lien is unavailing. It is merely a right to retain; and if the solicitor refuses to act for the client, it is of little, if any, value, as he cannot in that case deprive the client of the full use of the papers for the purposes of the suit; as I held in *Heslop v. Metcalfe*,<sup>(a)</sup> upon the authority, amongst other cases, of *Colegrave v. Manley*.<sup>(b)</sup> But if the client discharge or cease to employ the solicitor, the solicitor is not compellable to afford any facilities to the client by the use of the papers; [1] as Lord Eldon decided in *Lord v. Wormleighton*,<sup>(c)</sup> contrary to what he had before held in *Ross v. Laughton*.<sup>(d)</sup>

In the present case Mr. Cole was discharged, that is, the client ceased to employ him as solicitor in the cause. Having the deed in question in his possession, he might have withheld the use of it, and if it was essential to the client, might, by those means, have compelled payment of his general professional demand. But it would have been at the option of the client to purchase the use of the deed at that price or not. This option, however, was not tendered to the client; but the solicitor produced the deed as evidence in the cause, and now contends that a decree could not have been obtained without such \*production; that the fund has been realized by [\*359] the production of the deed, and that he is, therefore, entitled to the same lien upon the fund so realized as he had upon the deed.

Whether the production of the deed was essential to obtaining the decree is disputed; and I have no means of determining that point without rehearing the cause. But suppose it were so, what right had the solicitor by his own act, to create for himself a lien upon the fund to be realized? A man who has in his possession a document necessary to enable another to establish his title to a sum of money may, perhaps, be enabled to make an advantageous arrangement with the party wanting the evidence of the document; but if he, voluntarily, and without any agreement, produces the document, he cannot afterwards fasten upon the sum recovered, for a remuneration.

The solicitor's claim upon the fund has been called transferring the lien from the document to the fund recovered by its production. But there is no transfer; for the lien upon the deed remains as before, though, perhaps, of no value; and whereas the lien upon the deed could never have been actively enforced, the lien upon the fund, if established, would give a title to

(a) 3 Mylne & Craig, 183; [and see *Cane v. Martin*, 2 Beav. 584, 586, and n. 2, *ibid.*]

(b) 1 T. & R. 400.

(c) Jac. 580.

(d) 1 Ves. & B. 349.

[1] But in *Steele v. Scott*, 2 Hog. 141, although it was admitted that if a client by his conduct makes it impossible for his solicitor to continue any longer connected with him, and the solicitor in consequence refuses to continue the connection, he will be considered as if discharged by his client and will not be ordered to give up the client's deeds and papers until his costs are paid;—yet he was required to produce them to be used at the hearing, and for inspection. See 2 Beav. 586, n. 2.

1838 —Angell v. Davis.

payment out of it. The active lien upon the fund, if it exists at all, is newly created, and the passive lien upon the deed continues as before. If the doctrine contended for were to prevail, the lien of a solicitor upon the fund realized would, in most cases, extend to his general professional demand, and not be confined, as it always is, to the costs in the cause; for it must very generally happen that the plaintiff's solicitor has in his hands the documents necessary to establish his client's title to the money. Assuming that, [\*360] upon such document, he has a general lien for \*all his professional demands, he voluntarily produces it, by which the title to the fund is proved, and by so doing, according to the doctrine contended for, a lien upon the fund is established for all these demands. I find no authority for this but the case of *Worrall v. Johnson*; and not being able to reconcile that case with any sound principle, I cannot follow it.

I am, therefore, bound to decide that the assignees of Mr. Cole are entitled to payment, out of the fund in court, of the costs of the suit only; but as they had the case of *Worrall v. Johnson* to justify the claim they have made, I cannot make them pay the costs of bringing their claim before the court.[2]

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#### ANGELL v. DAVIS.

1839 : June 26 ; July 3.

Order varied, on appeal, as to costs, in a case in which they formed the sole subject matter of the appeal.

Consideration of the circumstances under which the court will entertain appeals limited to the question of costs.

THIS was an appeal from a decretal order on further directions, made by the Vice-Chancellor.

The petition of appeal stated that the petitioners considered themselves aggrieved by so much of the order as directed that the costs of the defendant Davis should be taxed as between solicitor and client, and that he should be at liberty to retain such costs out of the balance reported to be in his hands, and that in case such balance should be insufficient for that purpose, then that the residue of his costs should be paid out of the mortgage money therein mentioned; and it prayed that the order might be reversed or varied by directing that Davis should pay into court the full amount of such [\*361] balance, together with the amount of the costs which \*the order had

[2] Whether a solicitor, who, in relation to the same estate, in which the same parties are interested, has brought an ejectment and a suit in equity, has a lien upon the fund recovered in the suit in equity, for his costs of the ejectment, see *Hall v. Laver*, 1 Hare, 571. As to the general doctrine regarding an attorney's or solicitor's lien, and that it extends to moneys of his client received by him; see Paley, Pr. & Ag. (ed. by Dunlap,) 131, n. (A.) 2 Kent's Comm. 640, 641. *St. John v. Diefsendorf*, 12 Wend. 261. *Perkins v. Bradley*, 1 Hare, 231. 1 Sim. & Stu. 457, n. 1. 3 Myl. & Craig, 190, n. 1. 2 Beav. 586, n. 1.



1839.—Angell v. Davis.

directed the plaintiffs to pay to his co-defendant Boordman, and also should pay to the plaintiffs their costs of the suit, except the costs of taking the accounts of the receipts and payments of the plaintiffs Angell and Alexander, and the costs incurred in obtaining the appointment of a guardian of the infant plaintiff Mary Moore, and an allowance for her maintenance.

The circumstances of the case, and the question involved in the appeal, are fully stated in the judgment.

Mr. *Girdlestone* and Mr. *Wood*, in support of the appeal.

Mr. *Jacob* and Mr. *Richards*, contra.

THE LORD CHANCELLOR:—When this case was argued, I stated the opinion I had formed as to the merits, and it merely stood over in order that I might ascertain how far the court had gone in altering a decree upon an appeal with respect to costs only.

The facts of the case sufficiently appear upon the proceedings themselves. The original decree directed an inquiry as to the mode in which part of the property had been invested: the report shows that it had been invested in a manner inconsistent with the trust,—for so the master finds; and the order on further directions directs that property to be refunded and paid into court; so that, without going at all into the particular circumstances, or rehearing the cause, the decree, the report, and the order on further directions, supply all the materials that are necessary for considering and determining the question.

\*The order on further directions, with these facts before it, gives [\*362] to the trustee his costs of the whole cause as between solicitor and client, and directs them to be paid out of the trust estate. So far as relates to the general costs of the cause, I do not think there is any ground to impeach the order. But so far as the costs of the cause have been occasioned by the breach of trust, it appears to me to be evidently a mistake to give to the trustee the costs occasioned by his own misconduct; in other words, not only to give him his costs, but to make the *cestui que trust* pay them. So far from giving the trustee his costs, the general and ordinary rule would have been to make him pay the costs of so much of the suit as had been rendered necessary by his own improper dealings.[1]

It was strongly urged, however, that there was a rule of the court which peremptorily prohibited any alteration of a decree or decretal order being made upon an appeal merely raising the question of costs; and my purpose now is to consider how far such a rule applies in the case before me.

Three very important circumstances, it is to be observed, are to be found concurring in this case. The bill prayed that the defendant might restore the property and pay the costs, asking payment of the costs by way of spe-

[1] *Willis v. Hiscox*, ante, 197, 202, n. 1. A trustee guilty of a breach of trust was allowed the general costs of an administration suit as between solicitor and client, but was ordered to pay so much as had been occasioned by his breach of trust. *Pride v. Fooks*, 2 Beav. 430.

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 1839.—*Angell v. Davis.*


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cial relief; the case is one in which the proceedings themselves (without going into the details of the transaction) furnish all the information necessary for the purpose of determining the question: and lastly, it is not a case of personal costs, in which the court has ordered one party to pay them; but a case in which the court has directed them to be paid out of a particular fund.

[\*363] \*Now, keeping these distinctions in view, I apprehend it to be competent to the court, under such circumstances, to hear a cause, by way of appeal, upon the question of costs only; and although certainly the rule prohibiting appeals merely for costs is one which I am not disposed to carry further than it has been carried, well knowing that, especially in modern times, the real and substantial question in the cause frequently comes to be this very question, it will not, I conceive, in the present instance be necessary to relax it in the least.

I place no reliance upon what is represented to have fallen from Lord King in the case in *Mosely*,<sup>(a)</sup> which appears to have been misunderstood. The purchaser was there ordered to pay the costs of a fine to be levied by the defendants, and which was necessary to complete his title; so that the question, or one material question, was not as to the costs of the cause, but as to the costs of the conveyance of the estate. What was said by Lord Hardwicke, however, in *Owen v. Griffith*,<sup>(b)</sup> is directly and strongly in point. That was a suit against a mortgagee, who, on the taking of the mortgage accounts, had not been allowed his costs. Lord Hardwicke, in giving judgment on the appeal in that case, stated that the rule was established to save the appellate court from the vexation and trouble of having the whole subject matter gone into, which was generally necessary with a view to adjudicate on the question of costs. He observed, however, that it seemed somewhat strict and hard to adhere to it; for that, since the stamp duties, costs had come to be very material; and therefore, if a sound distinction could

[\*364] be made, it \*ought to be allowed. The distinctions which his lordship then took and relied upon were, that the party appealing was an incumbrancer for a just debt, and had a lien on the estate for his costs as well as his demand; and further, that his appeal, though for costs, affected the merits of the case;—circumstances which his lordship thought were sufficient to create an exception to the rule; and his lordship, accordingly, reheard the case upon the question of costs only.

Now, ordinarily speaking, a mortgagee is entitled to his costs, but he is not always so. Lord Hardwicke reheard that case simply upon the question of costs, and he eventually reversed the order upon that point. So, here, a trustee is undoubtedly entitled to his costs of a suit to administer the trust fund, unless a case of fraud or misconduct is established against him.[2] Ac-

(a) *Gould v. Granger*, Mos. 395, stated in *Beames on Costs*, 364, Appx. No. 12.

(b) 1 Ves. sen. 250; Amb. 520.

[2] *Holford v. Phipps*, 3 Beav. 434. *Pooler v. Pass*, 1 Beav. 600. *Bradley v. Amidon*, 10 Paige, 243.

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 1839.—*Angell v. Davis*.
 

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ording, therefore, to the doctrine of Lord Hardwicke in *Owen v. Griffith*, I am not only authorized, but bound, to rehear this case, for the purpose of seeing whether the ordinary rule applies to it. In *Cowper v. Scott*,<sup>(a)</sup> Lord Keeper Northington recognized the distinctions which were taken by Lord Hardwicke in *Owen v. Griffith*; and, upon the authority of that case, reheard the cause upon a question of costs only. The case of *Williams v. Beynon*<sup>(b)</sup> was referred to against the jurisdiction; but that appears to have been a case of personal costs, and therefore, not falling within the exception taken in *Owen v. Griffith*.

In *Jenour v. Jenour*,<sup>(c)</sup> in which Lord Eldon had occasion to consider the question, though his observations are confined to the facts of the case before him, \*the circumstances were such that the rehearing could [\*365] hardly have been refused. There was there a specially appropriated fund of stock, and the defendant who claimed an interest in that fund was also the personal representative; and being so, he prayed relief with respect to that fund, and prayed that the costs of the suit might be paid out of the general estate. Lord Eldon was of opinion that the decree relating only to the particular sum of stock, the costs of the suit could only be given out of that particular fund, and that the testator's general estate ought not to bear the burthen. There, again, Lord Eldon took the distinction between costs charged in a particular mode, and costs given, generally, out of the estate; and he referred, as an analogy, to the fact, that though you cannot in general revive for costs, you may, nevertheless, revive for them where they are to be paid out of an estate. There, too, he relies upon a circumstance which is also to be found in the present case, namely, that the payment of the costs was a substantive part of the relief prayed by the bill.

In *Taylor v. Popham*,<sup>(d)</sup> the question arose not upon a decree, but upon a petition. It appeared that a creditor had a contingent claim upon a particular fund, which had been appropriated to answer it: the order of Lord Erskine gave to the solicitors a lien for costs upon the fund generally; and the question on the appeal petition was, whether they should have those costs out of the appropriated fund in preference to the party having the contingent claim upon it. Lord Eldon's observation goes to the general question. "It is quite competent," says his lordship, "to rehear or appeal upon such a point respecting costs as this; that \*the court, having given [\*366] costs, has applied the fund of the party to a payment to which it ought not to have been applied."

In *Burkett v. Spray*,<sup>(e)</sup> a similar question arose before Lord Lyndhurst. There the party was declared to have a lien upon the fund for his costs until a future period. To the objection that the case was merely an appeal for costs, his lordship's answer was, that an appeal will lie for costs if any prin-

(a) 1 Eden, 17; and 1 Bro. C. C. 141, n.

(b) Stated in Beames on Costs, p. 360, Appx. 10; and see *Wirdman v. Kent*, 1 Bro. C. C. 140.

(c) 10 Ves. 562.

(d) 13 Ves. 59; 15 Ves. 72.

(e) 1 Russ. & Mylne, 113.

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ciple is involved, and if they are not merely given as consequential on the decree.

These cases seem to me to establish several propositions, any one of which is sufficient to support my jurisdiction on the present appeal: the costs are part of the relief specifically prayed; they are not mere personal costs, but are given out of the fund; and the whole of the facts, moreover, distinctly appear upon the face of the proceedings themselves, so that it is not necessary, in determining the question, to enter into any investigation of the merits.

I am glad to find I have the sanction of such high authorities for entertaining the question raised by this appeal; and I can have no hesitation, therefore, in varying the order of the Vice-Chancellor by declaring that the defendant, the trustee, must personally pay the costs, so far as they have been occasioned by his improper investment of the trust money, including all the costs of bringing it into court.(a)[3]

Reg. Lib. A. 1838, fol. 1211.

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[\*367] \*Between FRANCES NEDBY, (Wife of the Defendant WILLIAM NEDBY,) by JOHN SAMUEL DOVEY, her next friend, Plaintiff; and WILLIAM NEDBY, THOMAS ANNS, AND RICHARD KEEGAN, AND ELIZABETH STOCKS, (when within the jurisdiction of the court,) Defendants.[1]

1839: January 11.

When a fund, the title to which is litigated in the cause, has been brought into court, it is contrary to the practice of the court to determine the question of title upon interlocutory application, so far as to direct that the interest of the fund shall be paid to one of the parties claiming it, until further order.

Discussion of the validity of a limitation to the separate use of a woman who is single when the instrument comes into operation.

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(a) See further on this subject, *Taylor v. Southgate*, and *Eyre v. Marsden*, pp. 203, 231, *supra*.

[3] *Appleby v. Duke*, 1 Hare, 309. "Previous to the adoption of the revised statutes, [of New York,] it was an established principle that an appeal would not lie to reverse the decision of the court below, upon a question of costs only, where the giving or refusing costs was a matter of discretion merely; and such is still the law in relation to interlocutory costs, but not as to the general costs of the suit. The exceptions to the general rule on this subject, in the English court of chancery are stated by Lord Cottenham in *Angell v. Davis*; or rather, he shows a class of cases that do not come within the rule, because the giving or refusing costs in the cases to which he refers, depends upon certain fixed principles, rather than upon the exercise of the discretion of the court. The legislature however has by necessary implication, changed the law as to the right to appeal from a decision of the court of chancery in reference to the general costs of the cause or suit, by the provisions of the revised statutes which fixes the time for applying in such cases. (2 R. S. 605, § 79.) And the settled practice of this court and of the court for the correction of errors now is, to permit an appeal to be brought from a decree of the court below involving the question as to the equitable right to the general costs of the cause; although the giving or refusing of costs was a matter of discretion merely, and depended upon the facts and circumstances of the particular case, and not upon any certain and fixed principles of law." Walworth, Ch. *Lain v. Lain*, 10 Paige, 192.

[1] S. C. but on a different point, 8 Sim. 334.

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JAMES KEEGAN, by his will, dated the 1st of July, 1820, gave his leasehold messuages and other personal estate to the defendants William Nedby and Thomas Anns, upon trust to sell, and after payment of his debts, funeral and testamentary expenses, and legacies, to invest the residue in the purchase of bank stock, or in some or one of the funds of the Governor and Company of the Bank of England, in trust for his wife the plaintiff Frances Nedby, then Frances Keegan, and to pay the interest or dividends to arise therefrom, as often as the same should become due and payable, to his said wife (the plaintiff) for and during the term of her natural life, and for her own sole and separate use and benefit, and over which any future husband she might afterwards happen to intermarry with, should have no control whatsoever; and the testator declared, that her receipt alone, from time to time, should be a sufficient discharge to his executors and trustees and that his will and meaning was, that his wife should have full power, by any will, testament, or instrument in writing to be by her duly executed, to bequeath or dispose of one-half moiety of the moneys to be invested by his executors and trustees in manner and for the \*purpose aforesaid. [\*368] And as to the other half moiety of the said moneys so to be invested as aforesaid, from and immediately after the decease of his said wife, he gave, devised, and bequeathed the same and every part thereof unto and amongst all and every the children of his brother Thomas Keegan, and the survivor of them, share and share alike; but if but one, then to that only child who should be living at the time of the death of his said wife; and the testator, after giving certain specific and pecuniary legacies, appointed the defendants Nedby and Anns joint executors and trustees. By a codicil the testator appointed his wife (the plaintiff) joint executrix with the executors named in his will.

The testator died soon after the date of his will and codicil; and on or about the 10th of August, 1820, his will and codicil were proved by the executors and executrix.

On or about the 7th of October, 1820, the plaintiff married the defendant William Nedby, but no settlement or appointment of the plaintiff's interest under the will was made on that occasion.

The bill, which was filed on the 27th of September, 1836, alleged that the defendants Nedby and Anns possessed the whole of the personal estate, and to a considerable amount more than was sufficient for payment of the testator's debts and funeral and testamentary expenses; and that they had invested part of the personal estate in the funds, and had misapplied other parts; and that the dividends of the funds had been received by the defendant Nedby without the concurrence of the plaintiff, and that the plaintiff had been wholly deserted by him; and it charged that the defendant Nedby claimed to be entitled to such dividends, either by virtue of his marriage with the \*plaintiff, or under the authority of an indenture [\*369] made, as the defendants alleged, by the plaintiff, and dated the 9th



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of January, 1821, whereby, as they alleged, the plaintiff appointed and assigned unto and for the absolute use and benefit of Nedby, as well her life interest in the entire residue, as the ultimate interest and property of a moiety of the residue of the testator's estate.

The bill charged that the plaintiff never executed any such indenture as the indenture alleged to bear date the 9th of January, 1821; or that, if she executed the same, she did so in ignorance of its contents and purport, and without professional advice or assistance, and upon the faith of a representation made to her by William Nedby, under whose influence she was, that the execution of such indenture was merely intended to facilitate the proving of the will, and the duly administering the estate of the testator; and that she was deceived and imposed on in respect thereof: and it charged that the indenture ought to be held fraudulent and void as against the plaintiff; and that even if the same was valid, yet it was not intended to affect, and ought not to be held to affect her separate life interest in the trust property; and that even if William Nedby were entitled to the life interest of the plaintiff in the trust property, yet by reason of his having deserted the plaintiff, and left her without any provision for her support, she was now entitled to have a separate provision made for her thereout.

The prayer of the bill was, that the alleged indenture of the 9th of January, 1821, if any such had been executed by the plaintiff, might be declared fraudulent and void as against the plaintiff; or, if it should be found [\*370] to have been executed, and to be valid, then that it might be declared that, either according to or notwithstanding such indenture, the plaintiff was entitled to the interest and dividends of the testator's residuary estate, or a competent part thereof, for her separate use and maintenance, during her life; and that the defendants William Nedby and Thomas Anns might be decreed to account with the plaintiff for all the testator's personal estate, with interest on the balances from time to time in their hands; and that the clear residue might be ascertained, and applied upon the trusts of the testator's will, and properly secured for the benefit of the plaintiff and all other the persons who were or might be interested therein; and that the defendants Nedby and Anns might be decreed to account for all the dividends and interest of the trust fund since its investment, and might be directed to pay over to the plaintiff, for her separate use, the amount which should be found due from them in respect thereof; and that the defendants Nedby and Anns might be removed from being trustees, and that some other trustees might be appointed in their place, and that, in the meantime, they might be restrained from transferring or intermeddling with the trust property; and that, if necessary, a receiver thereof might be appointed.

The defendant William Nedby, by his answer, stated that all the residue of the testator's personal estate had been invested in the funds according to the trusts of the will; that the plaintiff never before or since her marriage with him (the defendant Nedby) received the dividends of the investments,



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but that the same had been received by him, when they became due, with the sanction of the plaintiff and of the co-trustee Anns, and had been applied by him (the defendant Nedby) to his own use, or to the joint use of himself and the plaintiff. He did not admit that his wife had been finally deserted \*by him, but stated that she had refused to live with him [\*371] in his present residence.

The answer further stated, that, by an indenture dated the 9th of January, 1821, the plaintiff, in consideration of love and affection for him (the defendant Nedby,) granted, bargained, sold, assigned, and appointed(a) to him, for his own absolute use and benefit, one undivided moiety or equal half part of all the messuages and estate of the testator; and that the plaintiff executed such indenture at the office of a solicitor whose name the answer mentioned, and that she did not execute it in ignorance of its contents or purport, or under such representations and influences as stated in the bill, but of her own free will and accord, in the full knowledge of its contents and operation, and with the advice of the solicitor before referred to, who was acting on her behalf, and that she was not deceived or imposed upon in respect thereof; and the answer submitted that the deed was intended to affect, and did affect her life interest in a moiety of the property.

The Vice-Chancellor, upon the motion of the plaintiff, made an order, on the 29th of November, 1838, by which it was ordered that the sum of 47*l.* 15*s.* 6*d.* cash in the bank, on the credit of the cause, should be paid to the plaintiff, upon her sole receipt; and that the interest from time to time to accrue due on the 1365*l.* new 3*l.* 10*s.* per cent. bank annuities, standing in the name of the Accountant General in trust in the cause, \*should be paid to the plaintiff, upon her sole receipt, until further [\*372] order.

The defendant Nedby now moved that the Vice-Chancellor's order might be discharged, and that the sum of cash and the dividends ordered to be paid to the plaintiff might be paid to himself.

Mr. *Wakefield* and Mr. *Rogers* appeared in support of the motion, and contended that the order was contrary to the practice of the court, and further, that the husband had a good title to the dividends in question, partly under the assignment and partly by virtue of his marital right.

Mr. *Jacob* and Mr. *Tennant*, *contra*, contended that the property was validly settled to the plaintiff's separate use; and for this purpose they relied on *Anderson v. Anderson*,(b) — *v. Lyne*,(c) *Davies v. Thornycroft*,(d) *Maber v. Hobbs*,(e) and *Tullett v. Armstrong* and *Scarborough v. Bor-*

(a) The words of the deed, as appeared by a copy which was referred to before the Lord Chancellor, were,—

"Grant, bargain, sell, assign, transfer, and dispose of, direct, and appoint:" and the deed purported to pass all the estate, right, title, &c. of the plaintiff in the moiety to which the deed related.

(b) 2 Mylne & Keen, 427.

(c) 1 Younge, 562.

(d) 6 Sim. 420.

(e) 2 Yo. & C. 317.

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man at the Rolls ;(a) and they particularly referred to *Bowes v. Strathmore*,(b) in which they submitted that the question of the validity of a limitation to the separate use of a woman who was unmarried at the time when the gift first took effect, might have been contested, inasmuch as such a limitation had been there made ; but its validity was admitted, although the object of the suit was to overturn the deed by which the limitation was made ; and there had, no doubt, been many other cases in which it had been assumed that the same thing could be done.

[\*373] \*They further contended that what the present order had done was no more than the court had in many cases done upon interlocutory application.

Mr. Wakefield, in reply.

THE LORD CHANCELLOR :—I very much regret that this question arises in a case in which the property is so very small in amount ; and I much regret that I cannot support the Vice-Chancellor's order ; but I think it contrary to all the principles of the court. First of all, the money is ordered to be paid into court. The court does not do that for the purpose of disposing of it upon an interlocutory application, but for the purpose of securing it. Suppose the money had remained in the hands of the trustees, what interlocutory application could there then have been for paying it over to one of the parties litigant ? What counsel would have opened such an application ? And what difference is made by its having been brought into court, instead of being allowed to remain in the hands of the trustees ? I am not under the necessity of stating to what extent the court might possibly go if it were perfectly clear that there could be no possible question about the person entitled to receive a sum of money ; but I cannot consider the title in this case so clear that the court is to exercise no discretionary power at the hearing.

Now, as to the deed. Undoubtedly, if I consider the wife as a *feme sole*, there are words in that deed which would assign that which she could assign. It is not for me to say, in the present state of this cause, what the result of that may be ; but the Vice-Chancellor has put that aside altogether.

[\*374] It is certainly not the practice of \*the court to decide questions of that sort, upon interlocutory applications. With regard to that part of the case, I think that the court below was not justified in making the order. Many of the cases alluded to as having gone as far upon interlocutory application as the present case—and which were very wholesomely decided—were an extension of the discretion of the court, but at the same time only for the purpose of securing the fund.[2] Here, however, the court would be paying away, to one of the parties litigant, money which could by no possibility be recovered.

Then, as to that portion of the income which is not comprised in the

(a) Since reported, 1 Beav. 1, *et seq.* [On appeal, post, 377.]

(b) 6 Bro. P. C. 427. S. C. 1 Ves. jun. 22.

[2] *Tullett v. Armstrong*, 1 Keen, 430.

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deed, it rests upon the state of the law as to the effect of the marital rights over property settled to the separate use of married women, coupled with certain acts done by the husband after the marriage, and which I think very important acts, and appearing to me very much to resemble the acts which had been done in the case which has been cited from the Court of Exchequer.(a) This question may be a very material one at the hearing of the cause; but I cannot adjudicate upon it on this interlocutory application; and, as to the question of the marital right, I can hardly state a question less proper to be treated as being so perfectly free from doubt as to justify the order which has been made in this case.

The case of *Newton v. Reid*,(b) as reported, clearly goes beyond every other case on the subject, and certainly involves every thing supposed to have been said in *Massey v. Parker*,(c) for it not only disposes of the fund itself, and states that the restraint is void, but it disposes \*of [\*375] the reversionary interest of the wife. Now that may require very much to be considered; but when I see what the Vice-Chancellor is represented to have said in this case, it appears to me to be directly contradictory of *Newton v. Reid*.

In *Massey v. Parker*, it certainly was not essentially necessary to decide the point; but it is not at all right to say that the opinion expressed in that case was an extrajudicial opinion, for it was an opinion expressed upon one of the two points raised in the cause. It was not extrajudicial at all, for it was given upon one of the two points in issue. It is true that that point was not the point upon which I did decide the case, and therefore it is very probable that it did not receive so much consideration as if it had been; but at the same time the opinion certainly was not extrajudicial.

It appears that I stated the point decided in *Newton v. Reid*, and in some other cases, without objection. I consider it involved in *Newton v. Reid*, and I, in terms, founded myself upon *Newton v. Reid*; but notwithstanding the opinion I expressed, and, undoubtedly, at the time, entertained, it has never, in any case since, been necessary for me to consider it again. I should be very glad that a question which has excited so much attention and is of so much importance should come before me; and if it has any where been said that I expressed an adherence to the opinion that I stated in *Massey v. Parker*, it is a very great misapprehension, and a great misrepresentation of the state of the case. I have had no opportunity of discussing the subject; and it always appeared to me that there were very great difficulties on both sides. It would be very desirable that what is wished for should in some way be done; but if it is to be done it must be by reference to some principle; and the only way in which it has occurred to me that [\*376] upon principle it could be justified is, by considering that the husband, finding the property in such a state, is estopped from disputing it, and

(a) *Maber v. Hobbs*, 2 Yo. & Coll. 317.

(b) 4 Sim. 111.

(c) 2 Mylne &amp; Keen, 174.

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 1839.—*Tullett v. Armstrong.*


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has come under a tacit understanding that the property should remain in the state in which he found it; which would be undoubtedly more consistent with principle than to consider that the restriction at one time existed and at another time did not exist. I shall be very glad of an opportunity of considering the question; and, certainly, I shall not be in the slightest degree fettered or influenced by the opinion I expressed in *Massey v. Parker*; but then I must find some principle upon which the trust can be supported.

I think it is very important that the question should be decided, and I shall be glad if the hearing of this cause before me can be made to afford an opportunity of determining it; and I am very glad of this opportunity of expressing an opinion as to the weight of that opinion attributed to me, and I have no doubt correctly attributed to me, in *Massey v. Parker*. [3]

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[\*377]      *TULLETT v. ARMSTRONG.*      *SCARBOROUGH v. BORMAN.*

1839: January 21, 22, 23, 24. 1840: January 22.

If property be given or settled to the separate use of a woman unmarried when the settlement or gift takes effect, and she be prohibited against anticipating it, it will, if not alienated by her when discoverd, be enjoyed by her as her separate estate, during any coverture or covertures to which she may afterwards be subject; and she will, during the existence of such coverture or covertures, be unable to anticipate it.

THE facts of these respective cases appear in the first volume of Mr. Beavan's Reports.(a) The question raised in *Tullett v. Armstrong* was two-fold, viz., first, whether property could be validly given to the separate use of a woman who was single when the gift took effect; and, if that could be done, then, secondly, whether she could be restrained from anticipation during the coverture, by force of a prohibition to that effect inserted in the instrument of gift. In *Scarborough v. Borman* the question was simply whether property could be validly given to the separate use of a woman who was single when the gift took effect.

(a) 1 Beav. I, *et seq.*

[3] See the next case. *Newlands v. Paynter*, post, 408. 1 Keen, 435, n. A clause against anticipation, annexed to a life interest in a trust fund bequeathed to a female infant, does not prevent her after she comes of age and before marriage, from effectually assigning her whole interest in the legacy. Lord Brougham, "I consider the prohibition quite ineffectual to tie up the fund. There is no gift over; and the legatee was not a *feme covert*; she was not indeed a *feme covert* either at the date of the will, or at the death of the testatrix, or at the date of the assignment. In *Newton v. Reid*, (4 Sim. 141,) the court held the restraint upon anticipation void, there being no gift over." *Brown v. Pocock*, 2 Russ. & M. 210. A female infant entitled to a legacy of stock given in trust to be accumulated till she should attain twenty-one, and to be then transferred to her for her separate use, cannot transfer her interest in such legacy, by the act of marriage to her husband; and if married at the time when she attains her majority, she takes an absolute interest in the legacy for her separate use. And the Master of the Rolls distinguishes this case from that of *Massey v. Parker*, decided by Lord Cottenham when at the rolls. *Johnson v. Johnson*, 1 Keen, 648. Anticipation must be prohibited in express terms. *Scott v. Davis*, ante, 89.

1839.—*Scarborough v. Borman*.

In the Rolls' Court, the case of *Tullett v. Armstrong* was fully argued, and the case of *Scarborough v. Borman* was rested upon the arguments in *Tullett v. Armstrong*. Both cases being now, however, brought before the Lord Chancellor upon appeal, the result of arrangements between the parties was, that the case of *Scarborough v. Borman* was first and principally argued, and that in the case of *Tullett v. Armstrong* a repetition of the arguments used in *Scarborough v. Borman* was, as much as possible, avoided.

\*SCARBOROUGH v. BORMAN.

[\*378]

1839: Jan. 21, 22, 23.—Mr. *Wigram*, and Mr. *Jemmett*, for the plaintiff, in support of the appeal.—If *Massey v. Parker* be overruled, then *a fortiori*, must all those cases be reversed which have decided that a restriction against anticipation imposed upon a woman who is discovert at the time at which the gift takes effect, is void; for a restriction against anticipation is a positive restraint upon the interest in the property. It is not disputed that an unmarried woman, to whose separate use property has been in terms settled, may, upon her marriage, give her husband, by means of a piece of paper, the absolute interest in that property; and why may not the act of marriage do the same? The court is now called upon to say that a person taking absolute property shall hold it so that she shall not have the power of dealing absolutely with it. It may be admitted, that if a testator gave property in trust for his infant daughter, with a direction that, if she married before she became of age, it should be held in trust for her separate use, that would be a perfectly valid direction, for she would never, in that event, have the power of absolute disposition, which, in the present instance, the woman had. It is upon the same principle that it is held, and rightly held, that a woman under coverture can take property only as it is given her, for she never had an absolute power of disposing of it.

*Anderson v. Anderson*(a) is not inconsistent with the opinion your lordship expressed at the Rolls in *Massey v. Parker*.(b)

\*Mr. *Tinney* and Mr. *Sidebottom*, in support of the demurrer.— [\*379] By the old common law, all the property, real and personal, of the wife was, not by any contract, actual or supposed, between the parties, but by the general policy of the law, submitted to the control of the husband. In process of time, the policy of the old law was found to be, in its strictness, very inconvenient, after property had so much increased, and after the modifications of property had become so much more numerous and varied, in consequence of the increased variety of the relations of society; and a review of the manner in which the principles of the law had been applied will show that, in truth, the law is a living system, capable of adapting itself to the exigencies of society.

It was at first considered necessary that property which was to be enjoy-

(a) 2 Mylne & Keen, 427.

(b) Ibid. 174.

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 1839.—Scarborough v. Borman.
 

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ed by a married woman for her separate use should be vested in trustees; *Harvey v. Harvey* ;(a) but it was afterwards held that the husband should be converted into a trustee for the separate use of his wife; *Bennet v. Davis*.(b) .

The policy of the law, in giving the wife a separate interest in property, was to secure her against the extravagance or improper influence of the husband; but the vesting such property in trustees for her separate use was found insufficient for this purpose; and it was not until after a considerable struggle that the object was fully attained; but attained it ultimately was, by the aid of Lord Thurlow; not, in the first instance, by means of a judicial decision, but by means of restrictive words inserted in a settlement [\*380] in which he was himself a trustee, \*namely, the restriction against anticipation, the great value of which had been suggested to him by the case of *Pylus v. Smith* ;(c) see *Parkes v. White*.(d) Now were not these modifications in the policy of the law made for the purpose of providing for future covertures, as well as for a present or immediately contemplated coverture?

The whole history of this law, and particularly that part of it which relates to the introduction of Lord Thurlow's qualification, was intimately known to Lord Eldon, who, in the case of *Jackson v. Hobhouse*,(e) enters a little into this history, and mentions that the restraint upon anticipation was first recognized in Lord Alvanley's decision in *Socket v. Wray*,(g) in the year 1793, where Lord Alvanley observed that it was remarkable that the restraint against anticipation had not, in that instance, been extended to future covertures as well as to the present coverture.

If the law on this subject was considered to be well settled (as we submit it was) you would not find it in decisions upon the point, but in incidental observations, and in the practice of mankind, or of that branch of our own profession who frame deeds and wills; and in the report of the recent case of *Davies v. Thornycroft*,(h) will be found references to old printed books of precedents which contain forms of gifts to the separate use of women not married; and it is perfectly notorious among conveyancers that such gifts have been in familiar and daily use from the earliest recollection of any living person, and that there has never been the least idea that the va- [\*381] lidity of the trust for the separate use depended, \*in any degree, upon the question whether the woman was married or unmarried at the time when the gift took effect. The case of *Beable v. Dodd*,(i) which occurred in the year 1786, though a decision of a court of law, is a distinct determination in favor of a limitation by will to the separate use of a woman unmarried at the time of the testator's death.

(a) 1 P. Wms. 125.

(b) 2 P. Wms. 316.

(c) 3 Bro. C. C. 340.

(d) 11 Ves. 209; and at pp. 221, *et seq.*

(e) 2 Mer 483.

(g) 4 Bro. C. C. 483.

(h) 6 Sim. 420.

(i) 1 T. R. 193.



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 1839.—Scarborough v. Borman.
 

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In the case of *The Countess of Strathmore v. Bowes*,<sup>(a)</sup> Lord Thurlow, in the year 1789, speaks of the limitation to the separate use of a woman not married or contemplating marriage as a matter of no doubt. He says, "Suppose a relation had given 10,000*l.* for her sole and separate use; if she had represented it as her own absolutely so that upon a marriage it would have gone to her husband, this court would have compelled the trustees to give it to the husband, but not otherwise; nor is there any difference between a fortune so circumstanced by an act of her own or of the donor."

In *Clayton v. Gresham*,<sup>(b)</sup> in the year 1804, the question was, whether a woman should, after her marriage, continue to receive the dividends of a fund in court, which had been given by a will to her separate use for her life, and of which she had received the dividends, under an order of court, up to the time of the marriage taking place; and Lord Eldon said only that an affidavit must be made to show that she did not, while she had the power, dispose of it.

The next case, *Anderson v. Anderson*,<sup>(c)</sup> in the years 1821 and 1822, is an express authority upon the point; \*for it was there [\*382] argued that a gift to the separate use of an unmarried woman was insensible, so far as the attempt to limit her mode of enjoying, or her power of disposing of the gift, was concerned.

No other case on the subject occurred until the time when the now existing doubt was raised by the observations made in *Massey v. Parker*,<sup>(d)</sup> in the year 1834, except the case of — v. *Lyne*,<sup>(e)</sup> which came before Lord Lyndhurst in the year 1832, and in which the validity of a limitation, such as that now contended for, was assumed. There is one other case, however, which may be considered to be in some degree material. It is *Simson v. Jones*,<sup>(g)</sup> decided by Sir John Leach in the year 1831. The question there was, whether a power of sale, given in a settlement made under the sanction of the court, upon the marriage of a female infant to whom leasehold property had been bequeathed for her separate use, was a valid power; and it was held it was not, Sir John Leach saying, that the only ground upon which a settlement of personal estate upon the marriage of a female infant was ever held valid was, that the settlement was the settlement, not of the wife, but of the husband, made by way of a limitation of his marital rights; but that in the instance before him, the leasehold estate in question being given to the separate use of the wife, the husband took no interest in it; and that if the power of sale were well created it was by the act of the infant; that it was not contended that she would be competent to create such a power if the settlement had not been made with the approbation of the court, and that the question therefore was, whether the court had jurisdiction to give to a female

(a) 1 Ves. jun. 22. See p. 27. S. C. 6 Bro. P. C. 427.

(b) 10 Ves. 283.

(c) 2 Mylne & Keen, 427.

(d) 2 Mylne & Keen, 174.

(e) 1 Younge, 562.

(g) 2 Russ. & Mylne, 365.

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[\*383] infant the power of \*disposition of her separate property during her infancy by a settlement made in contemplation of her marriage.

The cases of *Brandon v. Robinson*,<sup>(a)</sup> *Jones v. Salter*,<sup>(b)</sup> and *Barton v. Briscoe*,<sup>(c)</sup> only decide that property given for the separate use of a person who is or becomes *sui juris* may be disposed of by him or her, while *sui juris*, without regard to any direction to the contrary contained in the instrument by which the gift is made. *Newton v. Reid*,<sup>(d)</sup> in which the Vice-Chancellor seems to have held that a restraint upon alienating an annuity bequeathed for the separate use of a *feme sole* was void as against an assignment made by her and her husband after her marriage, was not argued, and the case was very little considered: it may, in fact, be said to have been an order made upon an unopposed petition; and it is to be observed that the wife joined in the petition.

[THE LORD CHANCELLOR:—It is quite impossible to maintain the decision upon that ground. What protection would there be to a married woman if the husband and wife could come and ask for the money? There was another objection, too, to the doing what was done in that case, though it is not applicable to the present question; namely, that the court was disposing of the reversionary interest of the wife, in an annuity which she might survive to enjoy.<sup>(e)</sup>]

If it were separate estate, she was competent to call for it. The [\*384] Vice-Chancellor has, in several cases, \*said, that in *Newton v. Reid* he only intended to follow *Barton v. Briscoe*. The decision, however, cannot stand; and *Barton v. Briscoe* decided no such thing as the Vice-Chancellor, taking a hasty view of it, would seem, from his observations in *Benson v. Benson*,<sup>(g)</sup> to have thought. References to *Newton v. Reid* are also to be found in *Knight v. Knight*<sup>(h)</sup> and *Davies v. Thornycroft*.<sup>(i)</sup>

The restraint upon anticipation introduced by Lord Thurlow was never intended to apply except in the case of females, and stands upon grounds entirely different from those upon which restrictions upon alienation by males can be placed; and Lord Thurlow's words can be applicable and intended to apply only to the case of a female's marriage; *Woodmeston v. Walker*.<sup>(k)</sup>

It may be admitted that a *feme sole* may, at all times before her marriage, deal with and alienate her separate property as she pleases; but marriage itself is not an alienation of her property real or personal; and this view is strongly illustrated by the fact that, if the husband survives the wife, the law gives him her property only in right of administering to her estate, so that the property remained in the wife and did not pass to the husband by force of the marriage, although he by marriage acquired a certain power and dominion over it. The moment the woman marries, the qualification of her property attaches; for the law of separate estate is a law attaching a peculiar

(a) 18 Ves. 429.

(b) 2 Russ. &amp; Mylne, 208.

(c) Jacob, 603.

(d) 4 Sim. 141.

(e) See *Stiffe v. Everitt*, 1 Mylne & Craig, 37.

(g) 6 Sim. 126.

(h) 6 Sim. 121.

(i) 6 Sim. 420.

(k) 2 Russ. &amp; Mylne, 197

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character to property which is given to a woman upon the terms of its being enjoyed for her separate use. The consent of the husband \*is [\*385] immaterial. In *Anderson v. Anderson*(a) the husband objected.

In *The Countess of Strathmore v. Bowes*,(b) in which the same principle was taken for granted, Lord Thurlow held, that if the husband, when he marries, knows of the qualification and is silent, he adopts it; and that, if he does not know of it, he marries with reference to the circumstances as they shall eventually prove to be, and that he shall not afterwards be allowed to dispute them. In *Brown v. Pocock*(c) there was this peculiarity, that the gift was in the nature of an executory bequest: it was to the daughter absolutely, but in case she should marry, then to her separate use.

*Massey v. Parker*,(d) which is chiefly relied upon by the appellant, was but slightly argued, and only two cases were cited; but it was decided upon two grounds; and the ground upon which the judgment principally rested, and which was of itself quite sufficient to support the decision, is entirely foreign to the present question. The doctrine promulgated in that case, and in the case of *Newton v. Reid*, has created great alarm in the profession, and particularly amongst conveyancers, whose practice, evidencing as it does what the law was and is, has from time immemorial been to limit property to the separate use of a woman, without reference to the circumstance of her being at the time single or under coverture.

It is proper to observe that this case is considerably stronger than the case of *Tullett v. Armstrong*, which is \*about to be argued before your lordship upon appeal from the Master of the Rolls, and which has been considered to be very much the same as the present case. In *Tullett v. Armstrong* there is not only a limitation to the separate use, but also a restraint upon anticipation, while the present case is one of a limitation to the separate use simply. Probably both those modifications of property may well stand together; but, at all events, the validity of limitations to the separate use was well established long before the restraint upon anticipation was thought of; and such limitations were always considered to be accompanied with the power of alienation, or, what is the same thing, of anticipation. It is too late, however, now to question even the validity of that restraint upon anticipation, which is, upon strict principles, inconsistent with that absolute power of disposition which is the consequence of a limitation being made to a married woman's separate use, and of her consequently being made a *feme sole* with regard to it; for it has received the sanction of an adoption in practice for forty years. Reference on this subject may also be made to Sugden on Powers,(e) *Lee v. Prieaux*,(g) and *Acton v. White*.(h)

Mr. Wigram, in reply.—It may be admitted that, when a gift by will for a woman's separate use comes to her when covert, she will take it as sepa-

(a) 2 Mylne &amp; Keen, 427.

(b) 1 Ves. jun. 22. S. C. 6 Bro. P. C. 427.

(c) 2 Mylne &amp; Keen, 189; and 2 Russ. &amp; Mylne, 210.

(d) 2 Mylne &amp; Keen, 174.

(e) Vol. 1, p. 203, et seq. ed. 1836.

(g) 3 Bro. C. C. 381.

(h) 1 Sim. &amp; Stu. 429.

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rate property, whether she was covert or not when the will was made ; and so also when it comes to a woman when an infant, and she marries before attaining her majority.

\*The case of *Massey v. Parker* is no infringement of the law of [\*387] separate use, whether it be considered with reference to principle, or to authority, or to practice.

1st, Upon principle. It may be admitted that it is not necessary to give the property to trustees. Before the law of separate use, however, was established, there was no qualification of the husband's title to the wife's personal property, or to the present income of her property, whether real or personal. What is the qualification which the law of separate use has introduced ? Why it is this, that the law has said that, in the case of a married woman, the qualification shall exist. If, however, the property comes to a woman who is single, it is her absolute property ; and the rule that the qualification should in such case be considered void, would be a rule of the purest principle, based upon the ground that the qualification would be inconsistent with the absolute property.

2dly, Upon authority. Is there any authority to show that, with respect to property given to a *feme sole*, the qualification does not merge in the absolute interest ? The principle that the absolute interest of a person *sui juris* cannot be qualified, has been recently acted upon in *Piercy v. Roberts*(a) and *Snowden v. Dales*.(b) The case of *Sockett v. Wray* did not decide that there might be such a limitation as the present ; it did not determine any thing more than that there may be a limitation to the separate use of a feme covert. If anything be wanting to get rid of the mere *dicta* of Lord Thurlow and Lord Alvanley, which the other side conceive they have found in

*The Countess of Strathmore v. Bowes* and *Lee v. Prieaux*, reference may be made for \*that purpose to *Acton v. White*.(c) which shows that so lately as the year 1823, it was a matter strenuously argued, whether the wife could anticipate the whole of a life income settled to her separate use. If both married and single women have equally the power of absolute disposition, what distinction can be made between their power and that of a man ? None, as Sir Thomas Plumer's observations in *Barton v. Briscoe* satisfactorily show. *Brandon v. Robinson* and *Barton v. Briscoe* clearly overrule the supposed *dicta* of Lord Thurlow and Lord Alvanley.

It is not very easy to understand the case of *Beable v. Dodd*, or how the question which would seem to have been there determined could have come before a court of law ; and, at all events, the decision of a common law court upon such a question is no very great authority. With respect to *Clayton v. Gresham*, all that Lord Eldon considered in that case was, whether the usual affidavit of the marriage was sufficient ; and his opinion was, that there ought to be an affidavit that no settlement had been made. The re-

(a) 1 Mylne &amp; Keen, 4.

(b) 6 Sim. 524.

(c) 1 S. &amp; S. 429.

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port of — *v. Lyne* gives no information at all as to the principle upon which the case was decided. It appears from the answer in *Anderson v. Anderson*, that in that case there had been a distinct agreement between the husband and the wife. The decisions in *Newton v. Reid*, *Brown v. Pocock*, and *Johnson v. Freeth*, are all in the appellant's favor ; and although the determination in *Davies v. Thornycroft* is opposed to us, yet it is to be observed that the court has never heard on any single occasion a solemn argument upon the question which is now before it.

3dly, As to practice. It is not true that the practice of conveyancers is in favor of such a limitation as that in support of which the respondents appear ; and, for this purpose, reference may be made to the forms contained in the Appendix to Roper's Husband and Wife ;(a) and, of course, it would be nothing to show that the practice of every country practitioner had been such as is alleged on the other side, unless it could be shown that the practice in question had been that of the most eminent conveyancing counsel.

Mr. *Tinney* subsequently handed to the Lord Chancellor a volume of Mr. Core's manuscripts, preserved in Lincoln's Inn Library, containing a MS note of a case of *Grimmett and Wife and trustees, plaintiffs, Cazanett and Cazanett, defendants*, before Lord Hardwicke, upon appeal from the Master of the Rolls, in the year 1747, in which the validity of a limitation to the separate use of a woman unmarried at the time was considered to be clear. Upon this case being mentioned, the Lord Chancellor said, it was evident from the circumstance of the husband and wife being co-plaintiffs, that the question now raised could not have been the question in the cause, and that it was impossible to suppose that the court adjudicated between the husband and wife.

*Tudor v. Samyne*,(b) was afterwards mentioned by Mr. *Wigram*, as showing that a second husband could assign a term of years settled to his wife's separate use by her first husband.(c)

(a) Pages 362, 401, 408.

(b) 2 Vern. 270.

(c) The reporters are informed by Mr. T. S. Clarke, that he extracted for the use of the Lord Chancellor the facts of the case of *Tudor v. Samyne*, as they appear in Reg. Lib. B. 1691, fol. 530, 531 ; and from that extract, with which he has favored the reporters, it appears that the settlement of the leasehold property upon which the defendant Editha Samyne relied, was stated by her answer to be a settlement made by her former husband Dr. Sermon, by assigning the leasehold estate to trustees, in trust to permit Dr. Sermon and the defendant, his then wife, to receive the rents and profits for the remainder of the term, if they lived so long, and after their death to permit their children (if any) to receive the same during the aforesaid term. It appeared also, that Dr. Sermon, at his death, left a son by the defendant, who was still living. It would seem, therefore, that the property in question was not settled to the wife's separate use at all.



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1839 : Jan. 23, 24.—Sir *W. Horne*, Mr. *Teed*, and Mr. *T. Sydenham Clarke*, for the plaintiff, in support of the appeal.—We rely upon the first will only, upon which the question is, first, whether a settlement to the separate use of an unmarried woman is good, which we contend it is ; and, secondly, whether the restraint upon anticipation imposed in such a case is valid, which we contend it is not, it being entirely inconsistent with the principle of separate property, and there being authority to show that, so long as the woman continues sole it is void ; *Woodmeston v. Walker*,<sup>(a)</sup> *Jones v. Salter* ;<sup>(b)</sup> and there being also authority to show that her marriage is not to have the effect of bringing it into existence ; *Woodmeston v. Walker*, *Newton v. Reid* ;<sup>(c)</sup> and there being neither authority nor principle on the other side. It is conceived also that the attention of the Master of the Rolls was not pointedly called to the question, whether the testator in the present case intended to restrain alienation during coverture.

[\*391]

\*Mr. *Wray*, *contra*.—The form adopted in the will upon which the present question arises has been universally used by conveyancers for the last fifty years, and if your lordship should now upset it, numberless settlements will be overturned, and the peace of families will be, in innumerable instances, destroyed.

The arguments which have been used in the case of *Scarborough v. Borman*, prove that a limitation to the separate use of a woman, unmarried at the time, is perfectly valid ; and prove also, that although the effect of such a limitation would be to make her a feme sole as to her separate property, and consequently to enable her to dispose of it absolutely, yet that that power may be restrained by what is called the provision against anticipation ; and that such is the case even although the woman might, before the coverture, treat such a provision as void : for, although some dicta in *Woodmeston v. Walker*, and the order in *Newton v. Reid*, would seem to show, that if such a provision does not operate from the beginning, it never operates at all, yet an answer, in that respect, to both those cases is implied in the case of *Brandon v. Robinson*.<sup>(d)</sup>

It may be observed also, that if the mere act of marriage is to have the effect of giving to the husband, absolutely, property which had been before settled to the separate use of the wife without contemplation of that particular marriage, the effect would be the same in the case of the marriage of a female infant ; and yet it is admitted that, in such a case, marriage would not have that effect ; and if such limitations as those now in question

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are not to be supported, it is obvious that no \*father can make any effectual provision for his daughter unless he happens to be living at the time of her marriage. *Beable v. Dodd*,<sup>(e)</sup> is a direct authority in favor

(a) 2 Russ. &amp; Mylne, 197.

(b) Ib. 208.

(c) 4 Sim. 141.

(d) 18 Ves. 429.

(e) 1 T. R. 193.



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of the Master of the Rolls' decision in this case; for the question, whether there was a good trust for the wife might well arise in a court of law. *Clayton v. Gresham*,<sup>(a)</sup> shows that a settlement made antecedently to the marriage is to have effect after marriage, unless some act is done to alter it; and a more direct authority than *Anderson v. Anderson*,<sup>(b)</sup> can hardly be conceived; decided, as it was, by the same judge who had given to the world the history and principles of the rules upon these subjects.

Sir W. Horne, in reply.

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1840: Jan. 22.—THE LORD CHANCELLOR.—The question raised in this case is as to the clause against anticipation; but I agree with the Master of the Rolls in thinking, not only that it necessarily involves the question of separate estate, which has been the subject of much discussion in the profession, but that these two questions are identical as to the principle which must regulate the decision upon them; by which I mean, that if the case be of a separate estate without power of anticipation, it must exist with that qualification or fetter, if it exist at all, and that there is no principle upon which it can be held that the separate estate operates during a coverture subsequent to the gift, but that the provision against anticipation, with which the gift was qualified, does not. It is obvious that such a rule would, \*in [\*393] practice, defeat the intention of the donor, and in many cases render the provision which he had made for the protection of the object of his bounty the means and instrument of depriving her of it.

When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a *feme sole*, as to bring with it all the incidents of property, and that she might therefore dispose of it as a *feme sole* might do, it was found that, to secure to her the desired protection against the marital rights, it was necessary to qualify and fetter the gift of the separate estate by prohibiting anticipation. The power to do this was established by authority, not now to be questioned, but which could only have been founded upon the power of this court to model and qualify an interest in property which it had itself created, without regard to those rules which the law has established for regulating the enjoyment of property in other cases.

If any rule, therefore, were now to be adopted, by which the separate estate should, in any cases, be divested of the protection of the clause against anticipation, it would, in such cases, defeat the object of the power so assumed.

A feme covert, with separate estate, not protected by a clause against anticipation, is, in most cases, in a less secure situation than if the property had been held for her simply upon trust. In the latter case, this court, with the assistance of her trustees, can effectually protect her; in the other, her sole dependance must be upon her husband not exercising that influence or control, which, if exercised, would, in all probability, procure the destruction

(a) 10 Ves. 288.

(b) 1 Mylne & Keen, 427.

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of her separate estate. In the case of a gift of separate estate [\*394] with a clause against anticipation, the \*author of the gift supposes that he has effectually protected the wife against such influence or control. Upon what principle can it be that this court should subject her to it, and by so doing defeat his purpose and completely alter the character and security of his gift? The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together. Indeed, I do not find any allusion, in any case, to the possibility of the one surviving the other, until after the discussion as to the continuing of the separate estate through a subsequent coverture had commenced. In the consideration of the cases upon which I am about to enter, I shall assume that there is no ground whatever, for the attempt which has been made in argument to separate the two. Every authority, therefore, which bears upon the one, will bear equally upon the other.

In a case of so much importance, and which has excited so much interest, I have thought it my duty not only to consider every case which has been referred to in argument, but to endeavor to obtain all other information which was within my reach. I will first examine the cases which are supposed to support the proposition, that the absolute interest of the woman which she unquestionably possesses in property given for her separate use, though with a prohibition against anticipation, up to the moment of her subsequent marriage, becomes subject to all the qualifications and restrictions of the gift, upon such marriage.

If Sir Edward Turner's case be correctly stated in *Tudor v. Samyne*,<sup>(a)</sup> which differs from the report in \*1 Vern. 7, and if *Tudor v. Samyne* be itself accurately reported, they would be instances of property settled to the separate use of a woman being alienable by an after taken husband. I do not, however, think that either is of any value upon the present question. They are of too early a date: the accuracy of the report upon this subject cannot be depended upon, and the point was not raised or argued, and cannot be said to have been decided.

Although no cases appear to have occurred until very late times in which the question was directly raised, yet decisions took place which necessarily led to the consideration of it. *Brandon v. Robinson*<sup>(b)</sup> and other cases having brought to view the rule that all restrictions inconsistent with the nature of the estate given are void in gifts to men, the case of similar gifts to females soon occurred. Sir William Grant, in *Jones v. Salter*,<sup>(c)</sup> and Sir Thomas Plumer, in *Barton v. Briscoe*,<sup>(d)</sup> held that property settled upon a married woman with a clause against anticipation, was, upon her becoming discovert by the death of her husband, absolutely disposable by her. *Wood-*

(a) 2 Vern. 270.

(b) 18 Ves 429.

(c) 2 R. &amp; M. 208.

(d) 1 Jac. 603.

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*neston v. Walker*(a) proceeded upon the same principle; but it has a more imperfect application to the present case, because Sir John Leach had refused to consider a single woman to whom an annuity had been given for her separate use, with a prohibition against anticipation, as having the dominion over the fund, because the provision contemplated a future marriage. Against this judgment, Sir Edward Sugden, upon an appeal to Lord Brougham, argued, “that it might be said, that as the words of the proviso point to a future coverture, the restriction would attach upon \*the plain- [\*396] tiff the instant she married, and that the court looking to that contingency would protect the executors in their refusal to transfer the fund, but that for such a proposition no authority would be adduced: that the language of the judgment in *Barton v. Briscoe* was directly opposed to it, and that the existence of a desultory and shifting fetter of that description was repugnant to legal principle, and would be attended with much practical inconvenience.” Against this, the practice of conveyancers and the necessity of affording to parents the means of securing property for their daughters in the event of their subsequent marriage was urged in vain. Lord Brougham declared the plaintiff entitled to an absolute interest in the property, after thus expressing himself: “It was said that the woman might have the property at her own disposal till she married, and that when that event happened, a sort of postponed fetter might attach, a fetter which would fall off upon her husband’s death, and be again imposed should she enter into a second marriage. That would be a strange and anomalous species of estate; nor is it very easy to conceive by what process or contrivance it could be effectually created, unless perhaps by annexing to the gift a limitation over to trustees, to preserve it for the woman during the successive covertures.” The decision in that case only confirmed the judgment of Sir Thomas Plumer in *Barton v. Briscoe*, because the party claiming the fund was discover; but the observations of Lord Brougham assume that a marriage would not bring what he calls the postponed fetter into operation, except possibly by the means he suggests. This case was decided in August, 1831. It does not appear from the report that *Newton v. Reid*(b) was cited, although it had been decided in December, 1830, which may be accounted for by what is \*stated in *Brown v. Pocock*(c) that *Newton v. Reid* had [\*397] been then recently reported. In that case a father had directed his trustees to purchase an annuity for his daughter for her separate use, with a prohibition against anticipation. The daughter was unmarried at her father’s death; but having afterwards married, she and her husband joined in assigning the fund to creditors of his, and both joined in a petition for the transfer of the fund according to the assignment; which the Vice-Chancellor ordered, saying, the annuity not being given over upon alienation, the restrictions are void. This order was made without argument; and it would not be

(a) 2 R. &amp; M. 197.

(b) 4 Sim. 141.

(c) 2 Russ. &amp; Mylne, 210; see p. 212.

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reasonable, therefore, to consider it as an expression of the deliberate opinion of the judge if it had not afterwards been recognized and approved.

In *Brown v. Pocock*,<sup>(a)</sup> Sir John Leach and Lord Brougham took the same view of the question they had respectively done in *Woodmeston v. Walker*, the case being the same; and Lord Brougham commented upon *Newton v. Reid*, saying, it was a stronger case than that before him, but did not express any disapprobation of it. The second case of *Brown v. Pocock*,<sup>(b)</sup> was the same as *Newton v. Reid*, the assignment having been after the marriage.

I now come to the case of *Massey v. Parker*,<sup>(c)</sup> which excited an interest to which it was very little entitled, either from the authority of the judge or any novelty in the doctrine. What was said upon this subject in that case has been represented as extrajudicial by some, and as a decision upon [\*398] the point by \*others. It certainly was not extrajudicial; because it was one of the questions directly in issue, and upon which the decision might have been rested. But it is, at the same time, true that there being another point in the case sufficient, in my opinion, to support the judgment I pronounced, it cannot be said that the point in question was that upon which the judgment was founded; and, for that reason, less attention was, perhaps, paid to the various considerations belonging to it than it was entitled to, and less than it probably would have received if the rights of the parties had depended upon the determination of it; and I must observe that, although the cases favorable to the proposition of which approbation was expressed, were very fully brought before me in the argument, none of those which are most important on the other side were referred to. It had, at that time, been decided that it was equally incompetent to affix to a gift to a single woman, as to a man, restrictions inconsistent with the estate given, and that in such cases the woman, before marriage, or upon becoming discovert by the death of her husband, had the absolute property in the fund; not, in the case of either a male or a female, that there was a power of relieving the property from the qualification and restriction imposed upon it; but that such qualification and restriction were void, and the title to the property absolute: and in *Woodmeston v. Walker*, it had been assumed that such qualification and restriction would be equally void after a subsequent marriage; which assumption had, in *Newton v. Reid*, been carried into effect, by directing a transfer of the fund upon the application of the husband and wife. It certainly did not occur to me, as it does not appear at that time to have occurred to any one else, that the separate estate could survive into a subsequent coverture, stripped of the protection which the prohibition against antici- [\*399] pation gives to it, and which alone, in \*many cases, prevents it from being an evil rather than a benefit to the wife. I cannot, therefore, think that there was any inaccuracy in saying that I must consider the point

(a) 2 Russ. & Mylne, 210; and 2 Mylne & Keen, 189.

(b) 5 Sim. 663.

(c) 2 Mylne & Keen, 174.

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as settled. Whether the expression of approbation of the doctrine as established was well founded is what I have to consider in the present case. That the expressions used in that case were not considered as promulgating any new doctrine may be inferred from the case of *Malcolm v. O'Callaghan*.<sup>(a)</sup> In that case property had been settled to the separate use of a married woman as against the then existing and any future husband, with a prohibition against anticipation. Her husband died, and she married a second husband, and they together applied for payment of the fund. *Barton v. Briscoe*,<sup>(b)</sup> *Newton v. Reid*, *Woodmeston v. Walker*, and *Massey v. Parker* were cited; and the Vice-Chancellor ordered the payment, saying that the general rule of law to be deduced from those cases was, that where a settlement to the separate use of the wife was made, with a view to an existing marriage or a marriage then in contemplation, it was competent for the wife, when she became discovert from that marriage, to rid the fund from the fetters imposed upon it, and if such a limitation were made by a will or otherwise in favor of a *feme sole*, who had not taken upon herself a state of coverture, but who was come of full age and able to act for herself prior to coverture, she was entitled to call for a transfer of the settled fund, and that the only means of preventing such party from a right to have the fund paid over was to insert in the settlement or will which created such a trust, a gift over in the event of alienation. No distinction is here taken between the separate estate and the prohibition against anticipation, or between the doctrine of *Massey v. Parker* and the other cases. The decision in *Johnson v. Freeth*<sup>(c)</sup> is even more pointed, because *Massey v. Parker* does not appear to have been referred to; but, upon the authority of *Newton v. Reid*, sanctioned by Lord Brougham, the Vice-Chancellor directed payment of the fund to an assignee of the husband and wife, saying, that except as to the marriage, with reference to which the settlement containing the clause against anticipation was made, that clause was to be taken as a nullity: that if such a clause applied to a woman before coverture, it was bad altogether, and if to a woman under coverture, it was void when the coverture ceased. It is, indeed, true that in *Benson v. Benson*,<sup>(d)</sup> although there was no decision upon the subject, there were some observations of the Vice-Chancellor, which seem to aim at a distinction between the separate estate and the clause against anticipation; and in *Davies v. Thornycroft*,<sup>(e)</sup> the Vice-Chancellor, expresses a distinct opinion, that although the prohibition against anticipation cannot operate during a subsequent coverture, the property may maintain its quality of separate estate. I have before said that I concur with the Master of the Rolls in thinking that this doctrine cannot be maintained.

In tracing the fluctuations of opinion which have existed upon questions relating to the separate estate of married women, it cannot but be observed that so late as the cases of *Woodmeston v. Walker*, and *Brown v. Pocock*,<sup>(g)</sup>

<sup>(a)</sup> 5 Law Journal, N. S. 137. <sup>(b)</sup> Jac. 603. <sup>(c)</sup> 5 Law Journal, N. S. 143, and 6 Sim. 423, n.

<sup>(d)</sup> 6 Sim. 126.

<sup>(e)</sup> 6 Sim. 420.

<sup>(g)</sup> 2 Russ. & Mylne, 210.



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Sir John Leach was of opinion that in order to preserve to a woman the benefit of a gift to her separate use without anticipation, she ought not to be enabled to dispose of the property whilst single or covert. The [\*401] \*contrary is now clearly established ; but the power of providing for daughters and guarding them against the chance of future want is thereby greatly impaired. Observations, therefore, which may have fallen from judges before it was made apparent that the separate use of a married woman in her property, being only a creature of equity created for the protection of married women, cannot exist so as to affect the power of a single woman, must be received with some qualification.

The case of *Beable v. Dodd*(a) was much relied upon by the respondents ; and, strange as it may appear that a decision of common law judges in an action of replevin should be applicable in a case of separate estate, which is said to be a creature of equity, it is certainly entitled to much consideration. It is, however, to be observed, that the whole of the argument and judgment turned upon the construction of the instruments, and that there was an express power reserved to the woman ; and Mr. Justice Lawrence in his argument for the defendant, said, cases of trusts created by a husband for the separate use of his wife, are very different from the present case of devise, generally, to a woman, notwithstanding her coverture. In the earlier case of *Carleton v. The Earl of Dorset*,(b) there was an express power ; and in *Edmonds v. Dennington* there cited, it does not appear by what means the power of the wife was secured to her. In *Bennet v. Davis*(c) the devisee was married at the time of the gift, and the only question arose from there being no trustee appointed. *Lady Strathmore v. Bowes*(d) has been cited as conclusive of Lord Thurlow's opinion ; but upon referring to the report of the same case in 2 Bro. C. C. 345, it will be found that the settle- [\*402] ment \*was upon trust to pay the rent, &c., to such uses as she should, whether sole or covert, appoint. In *Acton v. White*(e) the only question was, whether the words used amounted to a prohibition against alienation. The expression of Sir John Leach, therefore, that the intention was only to exclude the marital claims of any present or after-taken husband, cannot be considered as of any weight upon this subject, which was not before him.

The Vice-Chancellor, in *Davies v. Thornycroft*, considers the case of *Simson v. Jones*,(g) as decisive ; but, upon examining that case, it will be observed that the wife never had any power of disposing of the property. She was an infant when she married, and the property was to vest in her upon marriage under twenty-one, and then to be for her separate use. The estate and the provision for the separate use took effect at the same moment and by the same act. If the observations of Sir John Leach are construed

(a) 1 T. R. 193.

(b) 2 Vern. 17.

(c) 2 P. W. 316.

(d) 1 Ves. jun. 22. S. C. 6 Bro. P. C. 427.

(e) 1 S. &amp; S. 429.

(g) 2 R. &amp; M. 365.



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with reference to the case before him, they do not appear to have any application to the present case.

*Anderson v. Anderson*(a) may from its circumstances be the most important of all the cases in favor of the separate estate being in force through a subsequent coverture; but unfortunately there is no report of the grounds of the judgments of either Sir John Leach or Lord Eldon; and there were facts in that case which may have been relied upon by those learned judges which have no application to the general question. There had been a negotiation before the marriage respecting the property: the husband admitted that he had promised not to sell it. It was also part of the \*wife's case that the husband had refused to maintain her. Sir John [\*403] Leach's decree is the only important part of that case, because there were upon the answer sufficient admissions for an injunction till the hearing, without any decision upon the general question. The decree, however, must be considered as entitled to great weight; but it occurred in 1822, and before those cases which have created the difficulty and raised the doubt; for it must not be forgotten that Sir John Leach always maintained that the separate estate with all its qualifications and restrictions continued in operation during the time the woman was not under coverture. It is the establishment of the principle that this is not so which has created the difficulty of supporting it during the subsequent coverture.

The case of *Cox v. Lyne*(b) has been often referred to for the purpose of introducing the authority of Lord Lyndhurst into this discussion. From the report of that case it is not possible to ascertain what was the point in discussion. I have therefore examined the papers in the cause. The plaintiffs were holders of a promissory note of the married woman, under which they demanded payment out of her separate estate, and the bill stated distinctly, as a fact, that the property was held upon trust for the separate use of the wife, which, upon the demurrer, must have been taken as a fact, and so it really was, for the plaintiff afterwards amended the bill, and stated a settlement upon the marriage, by which the property was resettled to the separate use of the wife. The demurrer was very properly overruled, and this question did not arise in that case.

\*Such is the state of the authorities upon this very important [\*404] question. It is said to have been generally understood in the profession that the separate estate would continue to operate during a subsequent coverture, and that conveyancers have acted so extensively upon that supposition, that very many families are interested in the decision of this question. That circumstance ought to have great attention paid to it. For the future it would not probably be found difficult to obtain the desired security for the future wife by other means, consistent with the well established rules of property; but the existing arrangements must depend upon the decision of this case.

(a) 2 Mylne &amp; Keen, 427.

(b) 1 Yo. 562.

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I have over and over again considered this subject, with a great anxiety to find some principle of property consistent with the existing decisions, upon which the preservation of the separate estate during a subsequent coverture could be supported. I have been anxious to find means of preserving it, not only to maintain those existing arrangements which have proceeded upon the ground of its validity, but because I think it desirable that the rule should, if possible, be established for the future, believing as I do, that when a marriage takes place, the wife having property settled to her separate use, all the parties in general suppose that it will so continue during the coverture. To permit the husband, therefore, to break through such a settlement, and himself to receive the fund, would, in general, be contrary to the intention of the parties, and unjust towards the wife. This view of the case has led to a suggestion which has often been made in argument, by which the object might be attained without violating any rule of property, namely, by supposing the husband, marrying a woman with a property so settled, tacitly to assent to such settlement, or at least to be bound by an equity not to dispute [\*405] it. \*I was for some time much disposed to adopt this view of the subject; and in all cases in which the husband was cognizant of the fact, there would be much of equitable principle to support the gift or settlement against him; but putting the title of the wife upon such assent of the husband, assumes that, but for such assent, it would not exist. It abandons the idea of the old separate estate continuing through the subsequent coverture, and supposes a new separate estate to arise from the act of the husband. If the title of the wife were to rest upon that supposition, I fear that the remedy would be very inadequate, and that questions would constantly arise as to how far the circumstances of each case would afford evidence of assent, or raise this equity against the husband.

After the most anxious consideration, I have come to the conclusion that the jurisdiction which this court has assumed in similar cases, justifies it in extending it to the protection of the separate estate, with its qualification and restrictions attached to it, throughout a subsequent coverture; and resting such jurisdiction upon the broadest foundation, and that the interests of society require that this should be done. When this court first established the separate estate, it violated the laws of property as between husband and wife, but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property supported the validity of the prohibition against alienation.

[\*406] \*In the case now under consideration, if the after-taken husband be permitted to interfere with the property given or settled before the marriage to the separate use of the wife, much of the benefit and security of the rules which have been so established will be lost. Why then should not

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equity in this case also interfere; and if it cannot protect the wife consistently with the ordinary rules of property, extend its own rules with respect to the separate estate, so as to secure to her the enjoyment of that estate which has been so invented for her benefit? It is, no doubt, doing violence to the rules of property, to say that property which, being given with qualifications and restrictions which are held to be void, belonged absolutely to the woman up to the moment of her marriage, shall not be subject to the ordinary rules of law as to the interest which the husband is to take in it; (and that is the sense, and the only sense, in which the expression used in *Massey v. Parker*, “why may she not by the act of marriage give it to her husband,” is to be understood;) but it is not a stronger act to prevent the husband from interfering with such property, than it was originally to establish the separate estate, or to maintain the prohibition against alienation. In doing this I feel that I have much to overcome, of which the observations thrown out by myself, in *Massey v. Parker*, is the only part of which I do not feel the important weight. I have to contend with Lord Brougham’s observations in *Woodmeston v. Walker*, and the Vice-Chancellor’s decisions in *Newton v. Reid*, *Brown v. Pocock*, *Malcolm v. O’Callaghan*, *Johnson v. Freeth*, and *Davies v. Thornycroft*, to which I have before adverted, and the doctrine now established, though denied by Sir John Leach in *Brown v. Pocock*, and *Woodmeston v. Walker*, that before marriage, or after the coverture has determined by the death of the husband, the settlement or gift to the “separate use, and the prohibition against anticipation, are wholly [\*407] inoperative and void.

In establishing the validity of the separate estate with its qualification, which constitutes its value, that is, the prohibition against anticipation, I am not doing more than my predecessors have done for similar purposes, and I have much satisfaction in finding myself justified, upon the grounds I have stated, in doing what in me lies to dissipate the alarm which has prevailed lest the separate estate should be held not to exist at all during the subsequent coverture, or, what would in many cases be a greater evil, that it should exist without the protection of the clause against alienation.

I therefore affirm the decree appealed from.

Deposit returned. No costs.

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SCARBOROUGH v. BORMAN.

1840: Jan. 22.—THE LORD CHANCELLOR:—For the reasons given in the last case of *Tullett v. Armstrong*, I affirm the Master of the Rolls’ order in this case.

Deposit returned. No costs.[1]

[1] See the next case; *Nedby v. Nedby*, ante, 367; *ibid.* 376, n. 3; *Tullett v. Armstrong*, 1 Keen, 429; *Johnson v. Johnson*, *id.* 648; *Stead v. Nelson*, 2 Beav. 245; 10 Sim. 380, n. 1.

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 1839.—Newlands v. Paynter.
 

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[408] \**Between* MARY SARAH NEWLANDS, Wife of WILLIAM NEWLANDS (a Defendant) by ARTHUR WILTON, her next Friend, Plaintiff; *and* SAMUEL PAYNTER, Esq., Sheriff of Surrey, GEORGE HOLMES, and WILLIAM NEWLANDS, Defendants.

1839: December 5. 1840: February 28.

Personal chattels bequeathed to a single woman for her separate use, but without the intervention of any trustee, cannot be seized in execution by a judgment creditor of an after-taken husband.

JOHN PETER REINA, the father of the plaintiff, being possessed of three leasehold houses, Nos. 14, 15, and 19 West Square, in the parish of St. George, Southwark, and the furniture, plate, linen, and household utensils in the house No. 19 West Square, by his will, dated the 3d of October, 1833, gave to the plaintiff, by her then name of Mary Sarah Reina, all his property whatsoever; and he thereby specifically directed and ordered that any property he might have given or should give to the plaintiff should not be liable or subject to the interference or control in any way of any person or husband she might be married to, or liable to his then present or future debts; but her receipt alone should be a discharge for all and every sums of money or effects he might give or leave to the plaintiff; and that the plaintiff should dispose of the same by her will and testament as she pleased, notwithstanding her coverture.

The testator died on the 9th of October, 1833, and his will was proved by the plaintiff on the 23d of the same month.

On the 20th of November, 1833, the plaintiff married the defendant William Newlands, and after the \*marriage, she and her husband took up their abode in the house No. 19 West Square, in which were various goods and chattels which had belonged to the testator.

In the month of July, 1838, the defendant Holmes commenced an action of trespass against the defendant William Newlands, which action was tried at the Surrey summer assizes, 1839, and a verdict obtained for 200*l.* and costs, upon which judgment was afterwards signed, and on the 25th of November, 1839, a writ of *fieri facias* was issued, and was delivered to the defendant Paynter as sheriff of Surrey.

The plaintiff apprehending that the sheriff would seize the goods and chattels in the house No. 19 West Square, in which she and her husband still resided, filed the present bill on the 27th of November, 1839, praying that the sheriff might be restrained by injunction from executing the writ before mentioned, or any writ or process in the action, against the said leasehold premises, or against the goods and chattels in the house No. 19 West Square, or against any part of the said property, and from levying the 200*l.* and costs, or any part of it, out of the same; and that the defendant Holmes might be in like manner restrained from levying or causing to be levied any execution in respect of his claims against the defendant William Newlands, in the action or under the judgment therein, on the said property, or any part there-

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of; and that, in particular, he might be restrained from taking any proceedings to compel the sheriff to execute the writ before mentioned, or any writ or process in the action, against the said leasehold premises, goods, and chattels, or any part thereof.

\*Upon this bill being filed, it was supported by an affidavit of the [\*410] plaintiff, stating the before mentioned facts; and stating that she had not, at the time of her marriage, or at any time since her father's death, any property except that which she took under her father's will; that all the goods and chattels now in the house No. 19 West Square, had belonged to the testator, except certain specified articles which had been bought out of the plaintiff's separate income, and with moneys to which the plaintiff was entitled for her separate use; and that the same had been purchased to supply the wear and tear of the goods and chattels which were in the house at her father's death; and that no part of the goods and chattels now in the house had been purchased by the defendant William Newlands; and stating that the plaintiff had given notice to the defendant Holmes that the leasehold premises and the goods and chattels were the property of the plaintiff, and held by her for her separate use, and were not liable to the debts, engagements, or control of her husband.

Upon this affidavit, the Vice-Chancellor, on the 28th of November, 1839, granted, *ex parte*, an injunction, in the terms of the prayer of the bill.

On the 2d of December, 1839, the defendant Holmes moved, before the Vice-Chancellor, that the injunction might be dissolved with costs; but his honor refused the motion with costs,[1] and the sheriff, who was then in possession, thereupon withdrew.

The defendant Holmes now moved, before the Lord Chancellor, that the Vice-Chancellor's order of the 2d of December might be discharged, and that the injunction might be dissolved, with costs.

\*Affidavits had, in the meantime, been made on the part of the de- [\*411] fendant Holmes, tending to show that the plaintiff had encouraged her husband to commit the trespass in question, and stating that there was reason to suppose that some settlement had been made upon the occasion of the plaintiff's marriage.

A settlement made upon that occasion was produced before the Lord Chancellor; but it appeared to be confined to a sum of 6000*l.* bank stock, which then belonged to the plaintiff, and was part of the property derived under her father's will. By this settlement an interest in such bank stock was, in a certain event given to the husband.

Mr. Jacob, Mr. Richards, and Mr. Bethell, in support of the motion, contended that the equitable interest had merged in the legal interest, *Selby v. Alston*,<sup>(a)</sup> *Wade v. Paget*,<sup>(b)</sup> *Stephens v. Bridges*;<sup>(c)</sup> and that Mrs. Newlands could not have been contemporaneously the absolute owner, and also

(a) 3 Ves. 339.

(b) 1 Bro. C. C. 363.

(c) 6 Mad. 66.

[1] The case before the Vice-Chancellor, is reported 10 Sim. 377.



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a trustee for her own separate use: *Sprange v. Barnard*,<sup>(a)</sup> *Ross v. Ross*.<sup>(b)</sup> They further contended that the coverture contemplated by the testator was a coverture to commence in his lifetime. Independently, however, of these arguments, they submitted upon the authority of *Woodmeston v. Walker*,<sup>(c)</sup> *Brown v. Pocock*,<sup>(d)</sup> *Newton v. Reid*,<sup>(e)</sup> and *Massey v. Parker*,<sup>(g)</sup> that as Mrs. Newlands had not been married until after the gift of the property to her had taken effect, it could not be considered as held to her separate use. They further urged that it had never been held that personal chattels, such as formed part of the property now in question, could be settled to the separate use of a married woman.

Mr. *Wigram* and Mr. *James Russell*, *contra*, called the attention of the court to the present state of the law with respect to limitations to the separate use, and referred particularly to the cases of *Tullett v. Armstrong*, and *Scarborough v. Borman*, which awaited the Lord Chancellor's judgment; and they contended that the property ought to be secured until the questions of law involved in those cases should have been decided; and they referred to *Simpson v. Jones*,<sup>(h)</sup> and *Anderson v. Anderson*.<sup>(i)</sup> They cited *Lady Arundell v. Phipps*,<sup>(k)</sup> as being a case in which specific personal chattels had been settled to the separate use; they said that no distinction had ever been raised between such chattels and other personal estate, with reference to their susceptibility of being settled to the separate use. They referred also to *Stiffe v. Everitt*,<sup>(l)</sup> and *Gore v. Knight*;<sup>(m)</sup> and they argued that immediately upon the plaintiff's marriage, her husband became a trustee for her.

Mr. *Paynter*, for the sheriff.

Mr. *Richards*, in reply.

THE LORD CHANCELLOR said he was quite of opinion that the Vice-Chancellor's order could not be supported in any view of the case; for it was obvious that if the present question was not quite within some of those cases which were now under consideration, and upon which his lordship had to decide in determining *Tullett v. Armstrong* and *Scarborough v. Borman*, it was, at all events, very near some of them, and that the question must arise whether or not it was within them and therefore that the property ought, in the meantime, to be kept *in medio*; whereas the order now sought to be discharged put the property entirely in the possession of one party, and refused the other party's application with costs. It was said, indeed, that certain affidavits on the side of the party making the application, were such as the court below had disapproved of; but when that was the case the course of the court was to give the costs of such affidavits to the other side. His lordship did not propose to give any opinion upon the affidavits, for there was quite enough of doubt in the case

(a) 2 Bro. C. C. 585.

(d) Ibid. 210.

(h) 2 Russ. & Mylne, 365.

(l) 1 Mylne & Craig, 37.

(b) 1 J. & W. 154.

(e) 4 Sim. 141.

(i) 2 Mylne & Keen, 427.

(m) 2 Vern. 535.

(c) 2 Russ. & Mylne 197.

(g) 2 Mylne & Keen, 174.

(k) 10 Ves. 139.



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to make it his duty to protect the property. The most obvious way of doing this would be to allow the sheriff to resume possession, but not to sell; and to restrain the execution creditor from calling for a sale; and if Mr. Wigram's client would give security to be approved by the master, or would pay the money into court, the sheriff might withdraw; and thus the inconvenience of having an officer in the house might be avoided. The Vice-Chancellor's order must be discharged, inasmuch as it gave costs. All parties should have liberty to apply.

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"His lordship doth order that the orders made in this cause, dated the 28th day of November last and the 2d day of December instant, be discharged; and it is ordered that the injunction issued in this cause in pursuance of the said order, dated the 28th of day of November last, be dissolved; and it is ordered that the defendant Samuel Paynter, Esq., sheriff of the county of Surrey, \*be restrained by the order and injunction of this [\*414] court from selling, or proceeding to sell, any part of the property consisting of the leasehold premises being Nos. 14, 15, and 19 West Square, in the parish of St. George, Southwark, in the county of Surrey, with their appurtenances, or the goods and chattels now in the house No. 19 West Square aforesaid, under the writ of execution issued, or any other writ or writs of execution that may be issued out of the Court of Queen's Bench, in a certain action wherein the defendant George Holmes is the plaintiff, and the defendant William Newlands is the defendant, until this court shall make other order to the contrary; and upon the plaintiff giving to the said defendant George Holmes a sufficient security for the amount of the execution and levy, such security to be settled by the master of this court in rotation, the due execution of such security to be certified by the said master, or upon the plaintiff paying the said amount into the bank to the credit of this cause, it is ordered that the execution be withdrawn; and any of the parties are to be at liberty to apply to this court as they may be advised."

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After this order had been made, the sheriff again entered and resumed the possession of the goods; and he thenceforward continued in such possession, the plaintiff not availing herself of the option given to her by the last mentioned order, either by giving security or paying the amount of the execution into court.

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1840: Feb. 28.—The Lord Chancellor having given judgment in the cases of *Tullett v. Armstrong* and *Scarborough v. Borman*, [2] the plaintiff in this cause now moved that his \*lordship's order of the [\*415] 5th of December, 1839, "whereby the Vice-Chancellor's orders of the 28th of November, and 2d of December were discharged, and the injunction

[2] Ante, 377, *et seq.*

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issued in pursuance of the order of the 28th of November, was dissolved," might be discharged, and that the sheriff and Holmes might be ordered forthwith to withdraw the execution as against the leasehold premises and the goods and chattels in the house No. 19 West Square, and to withdraw from the possession of any part of the said premises, or of the said goods and chattels seized under the execution, and that Holmes might be ordered to pay the costs of the present application.

Mr. *Wigram* and Mr. *James Russell*, in support of the motion.

Mr. *Bethell*, for the defendant Holmes.—The order of the 5th of December was right, and ought not to be discharged.

With respect to the sheriff's withdrawing from possession, it is to be observed that the terms of the will are very peculiar, and there is no decision as to the effect which a will couched in such terms would have upon property, such as that which is involved in this cause.

The first question is, whether the testator intended to provide for any marriage but one which should be in existence at the time of his own death, and I submit that he did not.

The next question is, whether the words create a trust for the [\*416] separate use. The doctrine of separate \*use depends entirely upon the doctrine of trusts, and upon having trustees. A gift to A. and his heirs, in trust for A. and his heirs, is an unqualified fee. The doctrine that trusts shall not fail for want of a trustee, applies only to cases where there is a distinction between the legal and equitable interests, as where a testator charges his estates for certain purposes, but appoints no trustee; and the heir is then held to be a trustee for those purposes. Such also is the case of a gift to the separate use of a woman married at the time; for there the legal interest passes to the husband. Accordingly, it will be observed that, in *Bennet v. Davies*,<sup>(a)</sup> in which the husband was first held a trustee for the separate use of his wife, the lady was married at the time of the gift. The same observation applies to *Parker v. Brooke*.<sup>(b)</sup> The will, in the present case, did not, at the death of the testator, create that distinction between the legal and equitable ownership which makes the owner of the legal estate a trustee. At all events, the marriage is an absolute gift to the husband of chattels personal continuing in the possession of the wife; and nothing that has been decided shows that such is not the case.

*Lady Arundell v. Phipps*,<sup>(c)</sup> which was referred to by the plaintiff's counsel on a former occasion, was the case of a contract between the husband and wife after the marriage, and an actual purchase of chattels by the wife for 12,000*l.* out of her separate property; and the case, indeed, does not bear at all upon the question now before your lordship.

[\*417] \*The extension of the doctrine of separate use to chattels personal, in a case such as that now before your lordship, would open a wide door to fraud.

(a) 1 P. W. 316.

(b) 9 Ves. 583.

(c) 10 Ves. 139.

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[THE LORD CHANCELLOR:—I cannot entertain a doubt that the rule as to separate property as now established must apply to this kind of property. The principle of my decision<sup>(a)</sup> was, that a person marrying a woman with property so circumstanced, is considered as adopting the property in the state in which he finds it, and bound by equity not to disturb it. That is the only principle which I could find upon which to support limitations to the separate use under such circumstances.]

The settlement which was made in this case upon the occasion of the plaintiff's marriage is material for the present purpose, as showing what was the contract then made, and that it was the intention of the parties that the 6000*l.* bank stock should be exempted from what would otherwise be the legal operation of the marriage upon the whole, viz. a gift to the husband.

[THE LORD CHANCELLOR:—In fact the plaintiff got nothing by the settlement, and it is more consistent with the terms of the settlement to say, that it was made for the purpose of giving the husband an interest which he could not have under the will ; for that is the only effect of it.]

Mr. *Wigram*, in reply.

\*THE LORD CHANCELLOR:—I am very unwilling to defer dis- [\*418] posing of this case till the hearing of the cause. So far as the will gives property, I have no doubt about it ; but as to what falls within the terms of the will, that is a question of fact as to which I cannot determine. When once it is decided that subsequent marriage operates upon property given to a single woman to her separate use, it must operate with all its consequences. If the woman were married at the testator's death, no doubt would be raised ; and the principle of my decision was that the subsequent marriage attaches upon the property as it is. There is no evidence at present what the property is. I should propose a reference to the master to inquire whether any, and what part, of the property in the possession of the sheriff passed under the will.

Mr. *Wigram* then mentioned that it was stated on affidavit that part of of the property had been purchased with the plaintiff's savings out of the income of her separate estate.

THE LORD CHANCELLOR:—As that is stated on affidavit you can have an inquiry whether, if any part of the property did not pass under the will, by whom and by what means, and out of what fund such part was purchased.[3]

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The case was afterwards mentioned to the court upon the question of the terms of the order, and the following minutes were eventually settled ;—

(a) In *Tullett v. Armstrong*, *supra*.

[3] In *Shirley v. Shirley*, 9 Paige, 363, "The chancellor (Walworth) decided, that as the specific articles of furniture bequeathed to the wife by her aunt, were not bequeathed to her separate use, or free from the control of the husband, they were subject to his control, and were liable to his debts after they had been reduced to possession by him. That where personal chattels were be-

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“Refer it to the master of the court in rotation to inquire and state [\*419] to the court whether any of the \*property in the plaintiff’s bill mentioned, of which the defendant Samuel Paynter the sheriff is in possession, passed under the will of John Peter Reina, the testator in the pleadings of this cause named; and if the said master shall find that there be any of the said property in the hands of the said sheriff which did not pass by the said will, then let the said master inquire and state to the court by whom and under what circumstances the same was purchased or acquired; and for the better making the said inquiries, the parties are to produce before the said master upon oath, all books, papers, and writings relating thereto, and are to be examined upon interrogatories as the said master shall direct; and the said master is to be at liberty to state any special circumstances at the request of either party. And let the former order, dated the 5th day of December last, be continued; and reserve the question of costs until after the master has made his report.”

[\*420]

\*ELAND v. ELAND.

1839: May 29, 31.

A testator devised his real estate, charged with the payment of his debts and legacies, to his eldest son in fee, and appointed him executor. Nine years after the testator’s death, the devisee being then in possession, mortgaged the estate, and covenanted against all incumbrances except the legacies. In a suit subsequently instituted by one of the legatees for payment of his legacy, the estate was sold, and the proceeds proved insufficient to satisfy the testator’s unpaid debts and legacies, together with the mortgage money. Held, that the mortgagee’s title was complete, subject only to the amount of the legacies; and therefore, that, after reserving the amount of the legacies, the mortgagee was entitled to the residue of the fund as a security for his debt, and that the amount so reserved was assets of the testator unadministered, and was, therefore, to be applied, first in satisfaction of his debts, and then, so far as it would extend, in payment of his legacies.

The rule relieving a purchaser from seeing to the application of his purchase money where there is a general charge of debts and legacies, has reference to the state of things at the death of the testator; and if the debts are afterwards paid leaving the legacies charged, that circumstance cannot vary the rule.

THIS case, upon the hearing at the Rolls for further directions, is reported

queathed to a *feme covert* for her separate use, or were bequeathed to a single woman free from the control of her future husband, the court of chancery would protect her interest therein against the creditors of her husband, although no trustee was named in the will of the testator to hold them for her separate use. But that where they were bequeathed to her generally, without any such restriction, and had been reduced to possession by the husband with her consent, they became his property in equity, as well as at law. That the furniture purchased by the wife, with the moneys received for the rents of her separate estate, and mixed with the other furniture of the husband, was also his property and liable to his debts; there being no agreement or understanding between them at the time of the purchase, that such furniture should be kept by him as her trustee merely, or that the title thereof should be vested in any other person for her separate use.” And see *Langton v. Horton*, 1 Hare, 560; 10 Sim. 380, n. 1.

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in the first volume of Mr. Beavan's reports,(a) where the material facts upon which the question turned are fully stated.

It will be there seen that a real estate, which had been devised, subject to the payment of the testator's debts, and of an annuity, and of certain legacies, had been subsequently mortgaged by the devisee as free from incumbrances, except the annuity and the legacies; and that all the legacies, except one which had been bequeathed to the plaintiff, having afterwards been paid, the plaintiff filed his bill against the devisee, who was also executor, and the mortgagee, to obtain payment; and that it then appeared, that a creditor of the testator was unsatisfied, and that, without the estate in question, there was no property of the testator available for his payment; and it was decided that, in the hands of the mortgagee, the estate was subject to the payment of the amount of the annuity and the plaintiff's legacy, but not subject to the unpaid debt; and that the sum necessary to provide for the payment of the annuity and the plaintiff's legacy, constituted assets of the testator, and was \*applicable in the first place to the payment of the unpaid [\*421] debt.

By the order on further directions made by the Master of the Rolls, it was, in substance, declared that the mortgage security executed by the defendant Thomas Eland to the defendant Mary Dunn Crook, was subject to the annuity given to the defendant Mary Eland, the widow of, the testator, she electing to take the same in lieu of dower, and also to the plaintiff's legacy of 2000*l.*, but was not subject to the bond debt of 500*l.* found due to Robert Eland. And it was further declared, that the legacy and interest, and the value of the annuity and the arrears thereof, were to be borne, by the real estate so mortgaged, in priority to the defendant's mortgage; but that the sums to be set apart, as after-mentioned, to answer the same, were general assets of the testator's estate, and liable to pay the bond debt and interest in the first place: and the master was directed to tax the costs of the plaintiff, and also the costs, as between solicitor and client, of the defendant Mary Eland, and also the costs of Robert Eland, the bond creditor, of the hearing of the cause on the 16th of November, last,(b) and also of the defendant Mary Dunn Crook, as between party and party, and to compute subsequent interest on the bond debt, and also on the plaintiff's legacy, and to set a value on the annuity; and it was ordered that the sum of 5553*l.* 7*s.* 1*d.* bank annuities (being the stock in the purchase of which the proceeds of the sale, by consent, of the mortgaged estate, had been invested) should be sold; and that out of the money arising from the sale, and the sum of 416*l.* 10*s.* cash in the bank on the credit of the cause, which had arisen from \*interest [\*422] and dividends on the bank annuities, the amount of such costs. and also the amount of the valuation of the annuity and its arrears, and of the

(a) 1 Beav. 235.

(b) The bond creditor had applied by counsel on the hearing for further directions, having obtained leave so to do.

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legacy and interest thereon, should be carried over to the account of the plaintiff, and of the defendant, Mary Eland; and that out of the money so carried over the costs should be paid as therein mentioned; and that thereout also, what the master should certify to be due to Robert Eland for principal and interest on his bond should be paid to him; and that thereout also, what the master should certify to be the valuation of the annuity and due for the same and the arrears thereof, should be paid to the defendant Mary Eland; and that the residue of the sum so to be carried over should be paid to the plaintiff, in satisfaction, as far as the same would extend, of the principal and interest due to him in respect of his legacy; and that the remainder of the money arising from the sale of the bank annuities, after such carrying over as aforesaid, should be paid to the defendant Mary Dunn Crook, the mortgagee, in satisfaction, *pro tanto*, of the principal and interest due on the mortgage security.

The plaintiff presented a petition of appeal to the Lord Chancellor, in which he insisted that he was aggrieved by the order of the Master of the Rolls, inasmuch as it did not direct that the amount due to the petitioner (the plaintiff) for principal and interest on his legacy should be paid to him out of the fund in court produced by the sale of the estate; and he therefore appealed from the order "in the particulars aforesaid," and prayed that it might be reversed or varied.

Mr. *Temple* and Mr. *Roupell*, in support of the appeal, referred to [\*423] *Watkins v. Cheek*,<sup>(a)</sup> and *Johnson v. Kennett*,<sup>(b)</sup> and contended that on the principle of those cases, the reservation of the charge of legacies, contained in the mortgage deed, necessarily imposed on the mortgagee the duty of seeing that the mortgage money was properly applied. That deed, on the face of it, recited that the party borrowing the money was devisee in fee and in actual possession of the estate; so that the mortgagee was not only warranted, but bound, to presume that all the prior charges had been paid off; and then the case was reduced to the ordinary one of a devise of an estate charged with legacies, in which it would not be disputed that the purchaser was bound to see to the application of his purchase money. There was also this strong additional circumstance, that as against the legatees, the mortgagee had expressly elected to admit their title; and if a party with knowledge of the existence of two classes of trusts, one paramount to the other, voluntarily subjected himself to those of the inferior class, that necessarily involved his subjection to those of the first class also; for it was tantamount to a submission to let in all the claims which were paramount to those which he had agreed to recognize. It was monstrous to say, that in a case where the fund was sufficient to satisfy both classes of charges, the debts and the legacies, the trust, though in express terms created for the latter, should enure for the benefit of the former only.

<sup>(a)</sup> 2 Sim. & St. 199.<sup>(b)</sup> 6 Sim. 384.



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Mr. *Richards* and Mr. *Loftus Lowndes*, for the mortgagee, insisted that *Watkins v. Cheek* was a case of circumstances, furnishing no general principle; and that *Johnson v. Kennett* had been reversed by Lord Lyndhurst on appeal.<sup>(a)</sup> There was, therefore, no pretence for charging the mortgagee further than he had, by the deed, submitted to be charged; and the contest lay \*entirely between the legatee and the creditor, the single [\*424] question being, which of the two should have the benefit of the reservation contained in the mortgage deed.

Mr. *Wigram*, for the bond creditor, (who had appeared by counsel in the court below,) contended that inasmuch as the plaintiff had not appealed against that part of the order which directed the creditor to be paid out of the amount of the reserved fund, it was impossible for the court to make any order now which could prejudice his client. Independently of that objection, however, the creditor coming in competition with a legatee had a clear right to be first satisfied out of the testator's assets, of which it could not be denied that the value of the charge excepted out of the mortgagee's security formed a part. No appropriation had been made for the payment of the plaintiff's legacy; but if that had been otherwise, and even if the money had been actually paid, this circumstance could not have deprived the unpaid creditor of his right to call upon the legatee to refund; *Roper on Legacies*.<sup>(b)</sup> The case was no more than this, that the devisee and executor held in his hands general assets to pay debts and legacies, and that he had mortgaged the estate, but told the mortgagee there was a lien upon it for a certain amount of legacies. This was a mere matter of arrangement between himself and the legatees. If it did not amount to an appropriation (as in law it could not,) the executor was bound to apply the fund in the ordinary course; if it did, still the creditor was entitled to have his debt paid out of the fund, in preference to the claim of the legatees.

Mr. *Temple*, in reply, submitted that here was a specific portion of the estate expressly set apart for the \*payment of the legatees, [\*425] and constituting them *pro tanto* owners of the estate. It was a formal contract entered into with the purchaser, that a portion of the property should be applied in satisfaction of their claims. The decision of the Vice-Chancellor in *Johnson v. Kennett* had been cited with approbation by Sir Edward Sugden;<sup>(c)</sup> and the principle of the decision was left untouched, notwithstanding the reversal by Lord Lyndhurst.

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*May 31.*—THE LORD CHANCELLOR:—The course which has been adopted in the progress of the cause has given to this case an appearance of complexity that does not really belong to it. The peculiarity is, that the bill being filed by a legatee whose legacy is charged on the real estate, and the question being between the legatee and the mortgagee, the parties to the suit waived

(a) 3 Mylne &amp; Keen, 624.

(b) Vol. i. p. 398, 3d ed.

(c) 2 Sugd. V. &amp; P. p. 39, 9th ed.

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all the accounts ; and the result is, that so far as creditors are concerned, the suit is concluded, and that there is now no mode of ascertaining whether, besides this property in mortgage, there are any other means of paying the debts.

The state of circumstances appeared to be this ;—the master found a debt due to the bond creditor, and a sum of money due to the annuitant for arrears of her annuity, and a considerable sum of money due to the legatee. The estate was sold by consent, and a certain sum, not sufficient, however, to pay off the debts, legacies, and mortgage, was realized by the sale ; and when the cause came on before the Master of the Rolls for further directions, the question was, how he was to arrange the claims of these several parties to the fund which had been so realized.

[\*426] \*The principle of the decretal order then made, was to consider the mortgagee's title as good against all parties except those who were specially reserved in the mortgage deed. The mortgage was made subject to the plaintiff's legacy and to the widow's annuity. Of course, therefore, the proceeds of the estate were liable to pay the amount of that legacy and of that annuity ; and then the question arose, how was the creditor to be provided for ? There was nothing coming from the testator's assets except that which was deducted from the mortgagee's title on account of the legacy and annuity excepted in her mortgage. The Master of the Rolls considered that as a part, and the only available part, of the testator's estate ; nothing in fact remaining to be administered but that which was excepted from the mortgage. If that was the correct view of the case, there could be no doubt that the creditor ought to be paid out of it ; and therefore the real question comes to be, whether the mortgagee has or has not a good title as against the creditor.

On the part of the plaintiff it was contended, that there ought to be deducted from the mortgagee's security, not only the amount of the legacy and the value of the annuity, but also the amount of what was due to the creditor ; so that, in paying the creditor, you give the legatee a claim to the extent of his legacy as against the mortgaged estate. In support of that argument two cases were relied upon, being supposed to establish the proposition that, under the circumstances of this case, a mortgagee is bound to see to the application of his mortgage money. With respect to *Watkins v. Cheek*,<sup>(a)</sup>

which was one of the cases, it is only necessary to observe that the ground on which \*Sir John Leach rested his decision is wholly inapplicable here. Whether the circumstances of that case were sufficiently strong to justify the conclusion at which the learned judge arrived, it is not material to consider, the question being only as to the principle upon which Sir John Leach proceeded. Now, the principle of that decision is one which has been long established, and which does not, in the least, interfere

(a) 2 Sim. & S. 199.

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with the rule that, where the debts are charged generally, the purchaser or mortgagee is not bound to see to the application of the money—a rule introduced from the peculiarity and necessity of the case. That rule, however, is subject to this obvious exception, that if the mortgagee or purchaser is party to a breach of trust, it can afford him no protection. One obvious example is, where a devisee has a right to sell, but he sells to pay his own debt, which is a manifest breach of trust, and the party who concurs in the sale is aware, or has notice, of the fact that such is its object.

That is the whole of the principle laid down in *Watkins v. Cheek* ; and whether the facts in that case were strong enough to support the decision is a different and not now a material question. It is only necessary to refer to two or three sentences in the judgment to show that such was the principle. [His lordship here read part of Sir John Leach's judgment, and proceeded :—] That case, therefore, would be a very good authority here, provided the present case afforded evidence of the mortgagee being party to a breach of trust committed by the devisee.

The other case cited was *Johnson v. Kennett*,<sup>(a)</sup> which, no doubt, would carry the doctrine a great deal \*further ; for there was no evi- [\*428] dence in that case of any breach of trust. But then the purchasers had reason to believe, from the nature of the transaction itself, that the debts had been paid off ; and being of that opinion upon the evidence, the Vice-Chancellor considered that the case was the same as if nothing but legacies had been originally charged ; in which case, not being protected by an immediate charge of debts, the purchaser would not be exonerated from his liability to see the money properly applied.

If that doctrine had been supported, it would have gone far to destroy the rule altogether ; because, before it can come to that, the mortgagee must (and if he is to be liable he must in every case) go into an investigation of the fact of how far the debts have been discharged,—exactly that liability to which the law considers that he should not be subjected. That was one of the two grounds on which the Vice-Chancellor rested his judgment in *Johnson v. Kennett*, viz. that the transaction afforded evidence that all the debts had been paid ; the other being that, from the form of the conveyance, it appeared that the party who sold was dealing with the purchasers as owner of the estate. The latter ground is manifestly untenable. What evidence is it of a breach of trust that a party having such an estate, subject to such a charge, sells the estate as his own ? He is in truth the owner, subject to a charge ; and it his duty to satisfy the debts, which the sale may be the very means of of enabling him to do.

When *Johnson v. Kennett* was brought by appeal before Lord Lyndhurst,<sup>(b)</sup> his lordship reversed the decree, and observed that the rule of a purchaser being protected \*from seeing to the application of his [\*429] purchase money by a general charge of debts and legacies had refer-

(a) 6 Sim. 384.

(b) 3 Mylne & Keen, 624.

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 1839.—*Eland v. Eland*.
 

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ence to the state of things at the death of the testator; and that, if the debts were afterwards paid, leaving the legacies charged, that could not vary the rule. I entirely concur in that opinion; otherwise the mortgagee must, in every case in which there is a charge of legacies, take upon himself to investigate and ascertain whether the debts have been paid or not.

Taking, then, *Watkins v. Cheek* as proceeding upon the ground of fraud, and taking *Johnson v. Kennett*, decided by Lord Lyndhurst on appeal, as maintaining and not impeaching the rule, I have no doubt that the rule rests exactly as it did before those cases were determined, and has not been shaken by either of them.

The present is the case of a devise subject to the payment of debts and legacies; and, according to the master's report, here is a debt not paid. How then does the case stand? According to the decision, the mortgagee has a right to hold the estate discharged of any obligation to see to the application of the purchase money, except in so far as she by her own deed undertakes to be responsible. She is only purchaser of so much of the estate as may remain after payment of the annuity and legacies,—and there is no dispute as to her being liable to that extent,—while she is protected from seeing to the application of the mortgage money beyond. If so, she is then entitled to the whole of the proceeds of the estate as her security, *ultra* the amount of the excepted legacies; and that amount has been deducted; and so far the mortgagee is safe from any other claim.

Can there then be any doubt with respect to the portion that is [\*430] left? What is the sum which is so \*deducted? It is so much of the testator's estate still unadministered. The amount so deducted is the measure of what the mortgagee did not get a good title to: it remains, therefore, as part of the estate, and if so, must be dealt with as such. This is not even a case in which a creditor is seeking to call back a legacy previously paid; but the court gets into its own possession a portion of the estate unadministered.

Whether the legatees have sustained a loss is a question which, from the frame and course of the proceedings, cannot be considered now. This legatee, indeed, is not paid; but, according to the mode in which the estate is to be administered under the order, his rights are preserved; for the order gives him all that portion of the testator's unadministered estate which is not required for the purpose of paying the creditor, and he was not entitled to more.

The appeal must be dismissed with costs.(a)[1]

(a) See *Rogers v. Rogers*, 6 Sim. 364; *Braithwaite v. Britain*, 1 Keen, 206; and *Ball v. Harris*, p. 264, *supra*.

[1] In *Potter v. Gardner*, 12 Wheat. 498, it was declared by the Supreme Court of the United States, that the person who pays the purchase money to the person authorized to sell, was not bound to look to its application, whether the lands sold be charged in the hands of an heir or devisee with the payment of debts, or the lands be devised to a trustee for the payment of debts, un-

1840.—Miles v. Presland.

## \*MILES v. PRESLAND.

[\*431]

And in the Matter of F. W. COE, a Judgment Creditor of H. M., one of the defendants in the above-mentioned cause.

1840: March 3, 11.

A judge of the Court of Chancery is not a judge of one of the superior courts at Westminster, within the meaning of the fourteenth section of the 1 & 2 Vict. c. 110.

MR. HALLETT, on behalf of the judgment creditor, made an application at the Rolls, under the 1 & 2 Vict. c. 110, s. 14, for an order *nisi* to charge the fifth share of the defendant H. M. of and in certain sums of government stock standing in the name of the Accountant General of the court, to the credit of the cause, with the payment of a sum of money, being the amount for which judgment was signed against the defendant H. M., at the suit of the said F. W. Coe, in the Court of Exchequer of Pleas, and interest thereon.

THE MASTER OF THE ROLLS expressed a doubt as to his having power under the statute to make such an order; but, upon its being suggested to him that the Vice-Chancellor had made a like order under similar circumstances, his lordship said he would look into the act of parliament. On a subsequent day, his lordship stated that he had read the act, and had also ascertained that the Vice-Chancellor had made an order in a similar case, but that he still doubted the jurisdiction; and he requested that the motion might be made before the Lord Chancellor.(a)

Mr. *Hallett* accordingly renewed the application, before the Lord Chancellor, and submitted that the different judges of the Court of Chancery had power to \*make orders under the fourteenth section of the act. [\*432] The power to make the order was given by that section to a "judge of one of the superior courts at Westminster," and was not confined to the judges of the superior courts *of law* at Westminster; and the Court of Chancery clearly came within the description of "one of the superior courts at Westminster," being one of the superior courts among which the jurisdiction of the one original supreme court of justice in this country, the *Aula Regia*, was divided.(b) The Court of Chancery was, in fact a common law court as

(a) Now reported 2 Beav. 500.

(b) 3 Blacks. Comm. 37-47.

less the money be misapplied with his co-operation." In an earlier case in the same court, Story, J. delivering its opinion said; "There is much reason in the doctrine, that where the trust is defined in its object, and the purchase money is to be re-invested upon trusts which require time and discretion, or the acts of sale and re-investment are manifestly contemplated to be at a distance from each other, the purchaser shall not be bound to look to the application of the purchase money; for the trustee is clothed with a discretion in the management of the trust fund, and if any persons are to suffer by his misconduct, it should be rather those who have reposed confidence, than those who have bought under an apparently authorized act." *Wormley v. Wormley*, 8 Wheat. 421. See further *Wood v. White*, post, 482; *Sutherland v. Brush*, 7 Johns. Ch. Rep. 21; *Field v. Schieffelin*, id. 150; *Champlin v. Haight*, 10 Paige, 274; *Shaw v. Borrer*, 1 Keen, 559; *Page v. Adam*, 4 Beav. 269, 283; *Jones v. Price*, 11 Sim. 557, 568; 4 Kent's Comm. 180, n. a.; 2 Sim. & Stu. 206, n. 1; 1 Keen, 578, n. 1.

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 1839.—Bacon v. Jones
 

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well as a court of equity ; and although it had been doubted whether the Master of the Rolls had any jurisdiction on the common law side of the court there was no doubt as to the Lord Chancellor having such a jurisdiction. If the judges of the Court of Chancery could not make orders under the fourteenth section, the Accountant General of that court would take no notice of an order made by any of the common law judges, so that the party obtaining a judgment must first get an order from a common law judge under the fourteenth section, and then come to chancery for a further order or decree upon petition or bill ; and as judgments were frequently for very small sums, such a course of proceeding would entail a heavy expense upon creditors. The eighteenth section of the act might seem unfavorable to the construction contended for, but that gave jurisdiction merely in cases not provided for by the prior sections. Mr. Hallett also cited two cases before the Vice-Chancellor in which similar orders has been made.

His lordship, on reading the fourteenth and eighteenth sections, said, that he considered the objection of the Master of the Rolls to be well [\*433] founded ; but that, \*before deciding the point, he would speak to the Master of the Rolls and the Vice-Chancellor on the subject.

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1840 : *March* 11.—THE LORD CHANCELLOR stated that he had consulted with the Master of the Rolls and Vice-Chancellor, and that they all were of opinion that the judges of the Court of Chancery had no jurisdiction to make orders upon judgments under the 1 & 2 Vict. c. 110, s. 14, and that the application should be made to one of the common law judges of the superior courts at Westminster. His lordship added, that although the Vice-Chancellor had made such orders, his honor's attention had not at the time been called to the objection.(a)

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### BACON v. JONES.

1839 : July 13, 24, 26

In August, 1835, a patentee filed a bill to restrain an alleged infringement of his patent, and the defendant having by his answer denied the validity of the patent, and also the fact of the alleged infringement, the plaintiff made no interlocutory application for an injunction, but went into evidence in support of his case, and in May, 1839, brought the cause to a hearing. The Master of the Rolls being of opinion that the plaintiff, upon the evidence, had not made out a case which would have supported an injunction if applied for in the interlocutory stage, refused to give him an opportunity of establishing his title at law by retaining the bill, with liberty to

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(a) By the late statute, 3 & 4 Vict. c. 82, s. 1, the judges of the superior courts at Westminster are authorized to make orders as to any stock, funds, annuities, or shares, standing in the name of the Accountant General of the Court of Chancery, or the Accountant General of the Court of Exchequer, in which the judgment debtor has an interest, in like manner as if the same had been standing in the name of a trustee for him.



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 1839.—*Bacon v. Jones*.
 

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bring an action ; and dismissed the bill with costs ; and the Lord Chancellor, on appeal, affirmed this decision.

Consideration of the principles and practice of the court in granting injunctions in patent cases upon interlocutory motions and at the hearing.

THIS suit was instituted in the month of August, 1835, for the purpose of establishing the plaintiffs' exclusive right to a patent for the manufacture of a \*gas-lamp burner of an improved construction, called [\*434] "The Patent Double Cone Gas-burner." The bill alleged that from the time of the granting of the letters patent, which were dated the 2d of July, 1829, until the acts of infringement complained of, the plaintiffs, or those under whom they claimed, had been in the sole and undisturbed enjoyment of the patent right ; but that the defendants had recently infringed the patent by manufacturing and selling gas-burners constructed on the same principle, and which were counterfeits or imitations of the gas-burners of the plaintiffs ; and it prayed that the defendants might account for the profits which they had made by the sale of burners so piratically manufactured, and might be perpetually restrained by injunction from infringing the patent in future.

After the bill was on the file, the plaintiffs did not apply for any interlocutory injunction ; but upon the answers coming in, denying the validity of the patent and the fact of the alleged infringement, they filed a replication, and went into evidence to prove the originality and usefulness of the patent invention, and the acts of alleged piracy with which they sought to fix the defendants. They afterwards brought on the cause to a hearing, when the Master of the Rolls made a decree dismissing the bill with costs.

The plaintiffs now appealed against that decree.

The nature of the invention and the particular circumstances of the case are stated in detail in Mr. Bevan's report, upon the hearing of the cause in the court below.(a) But from the view taken by the Lord Chancellor \*in his judgment, it becomes unnecessary to refer to them particularly. [\*435]

Mr. *Richards*, Mr. *James Parker*, and Mr. *Johnes*, for the appeal.

Mr. *Wigram* and Mr. *Simons*, in support of the decree.

Upon the argument of the appeal, three questions were made ; first, whether the patent, being for a principle, was not void upon that ground ;[1] secondly, assuming the patent to be good, whether there had in fact been any infringement, the burner of the defendants being, as was contended, of a totally different construction from that of the plaintiffs ; and thirdly, whether the plaintiffs, by omitting for the four years during which their bill was on the file to apply for an interlocutory injunction, had not absolutely deprived themselves of the right to ask for relief at the hearing, it being contended

(a) *Bacon v. Spatterwoode*, *Bacon v. Jones*, 1 Beav. 382 The appeal to the Lord Chancellor was in the second of these causes only.

[1] *Wyeth v. Stone*, 1 Story's Rep. 274.

1839.—*Bacon v. Jones.*

that the injunction could only proceed upon the foundation of a legal title, which title had not yet been established, and that an account was only given as incident and consequential to the injunction. With reference to the third point, upon which the Lord Chancellor's judgment entirely turned, the following cases were referred to; *Jesus College v. Bloome*,<sup>(a)</sup> *Smith v. Cooke*,<sup>(b)</sup> *Turner v. Winter*,<sup>(c)</sup> *The Universities of Oxford and Cambridge v. Richardson*,<sup>(d)</sup> *Baskett v. Parsons*,<sup>(e)</sup> *Barry v. Barry*,<sup>(g)</sup> *Baily v. Taylor*,<sup>(h)</sup> *Crosley v. The Derby Gas Light Company*,<sup>(i)</sup> *Millington v. Fox*.<sup>(k)</sup>

[\*436] \*The plaintiffs insisted that if the evidence was not sufficiently strong to entitle them at once to a perpetual injunction, yet at all events the bill ought to be retained for a year, with liberty to bring an action at law in the mean time.

THE LORD CHANCELLOR :—The jurisdiction of this court is founded upon legal rights: the plaintiff coming into this court on the assumption that he has the legal right and the court granting its assistance upon that ground.[2]

When a party applies for the aid of the court, the application for an injunction is made either during the progress of the suit, or at the hearing; and in both cases, I apprehend, great latitude and discretion are allowed to the court in dealing with the application. When the application is for an interlocutory injunction, several courses are open: the court may at once grant the injunction, *simpliciter*, without more—a course which, though perfectly competent to the court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual, and, as I apprehend, more wholesome practice in such a case, of either granting an injunction, and at the same time directing the plaintiff to proceed to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the mean time keeping an account. Which of these several courses ought to be taken, must depend entirely upon the discretion of the court, according to the case made.

When the cause comes to a hearing, the court has also a large latitude left to it; and I am far from saying \*that a case may not arise in which, even at that stage, the court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent right, and of the evidence by which it is established,—these and other circumstances may combine to produce such a result; although this is certainly not very likely to happen, and I am not aware of any case

(a) 3 Atk. 262. Amb. 54.

(b) 3 Atk. 378.

(c) 1 T. R. 602.

(d) 6 Ves. 689.

(e) Stated in 6 Ves. 699; and see p. 707.

(g) 1 J. & W. 651.

(h) 1 Russ. & Mylne, 73.

(i) 4 Mylne & Keen, 72; and Mylne & Craig, 428.

(k) 3 Mylne & Craig, 338.

[2] *Sheriff v. Coates*, 1 Russ. & Mylne, 159.

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1839.—Bacon v. Jones.

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in which it has happened. Nevertheless, it is a course unquestionably competent to the court, provided a case be presented which satisfies the mind of the judge, that such a course, if adopted, will do justice between the parties.

Again, the court may, at the hearing, do that which is the more ordinary course; it may retain the bill, giving the plaintiff the opportunity of first establishing his right at law. There still remains a third course, the propriety of which must also depend upon the circumstances of the case, that of at once dismissing the bill.

With respect to the first of these three courses, I think it will hardly be contended that the present is a case in which the court would grant a perpetual injunction *simpliciter*. And the only question which I have to consider (and it is the same which the Master of the Rolls stated that he had to consider) is, whether this is a case in which the court ought to retain the bill for the sake of giving the plaintiffs the opportunity of now establishing their title by a proceeding at law, or whether it is not a case in which the court ought to dismiss it, leaving the plaintiffs to such rights at law as they may be advised to assert.[3]

[3] In the case of the owner of a bridge erected by authority of an act of parliament, also imposing a certain penalty for passing the river, within certain limits, so as to evade the toll due him, and a railway company who transported their passengers by steamboats, across the river, within the exclusive limits of the owner of the bridge, a motion for an injunction against the company was, under the circumstances of the case, and on full consideration, refused: for one among other reasons; that as there was no urgent necessity for an injunction, the case might go to law unprejudiced. Wigram, V. C. "That the defendants do thereby deprive the plaintiff of a great portion of the traffic over his bridge, cannot be doubted; and this is not less the case because, perhaps, many of the passengers who now pass the bridge, or would pass over the bridge if the steamboats were not used, would not have had occasion to cross the bridge if the railway had not been made. But the plaintiff's right is purely a legal right, and the province of a court of equity in such a case is simply to protect the legal right. It is admitted that the right must be tried at law; and the only question now is, whether I am to grant the injunction pending that trial, or give the plaintiff liberty to apply again when he shall have established his legal right. This question came repeatedly before Lord Cottenham, and has been the subject of several of his most elaborate judgments. He considered it very much in the case of *Bacon v. Jones*, and the result of his observations is, that it is always a matter in the discretion of the court. If the court is clearly against the plaintiff, it may refuse the injunction at once, merely giving him leave to proceed at law, (which, pending the suit in equity he could not do without that leave,) with liberty to apply if he succeeds at law. But on the other hand, if the court is clearly with him, the court may, in the exercise of its discretion, grant the injunction in the first instance. Supposing the question of the legal right to be one on which the court is not prepared to express an opinion, the court is generally governed by the consideration of the convenience or inconvenience on the one side or the other. If giving to the one party the power of doing the acts complained of, would be attended with irreparable or very serious mischief to the other, the injunction is more commonly granted; but if, on the other hand, there be a balance of inconvenience, the court will generally leave the parties in the situation in which they are, until the legal right shall have been established." In conclusion, the Vice-Chancellor said: "Taking the case, however, to be one where there is no irreparable mischief and extreme damage which may not afterwards be compensated, I think it ought to go to law unprejudiced, and that it would not do if, where the amount of injury is so small, I should pronounce an opinion in favor of the legal right before the trial at law." *Cory v. The Norwich and Yarmouth Railway Company*, 3 Hare, 593, 600, 605, and see *infra*, n. 5.

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1839 — *Bacon v. Jones*.

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Generally speaking, a plaintiff who brings his cause to a hearing [\*438] is expected to bring it on in such a state \*as will enable the court to adjudicate upon it, and not in a state in which the only course open is to suspend any adjudication until the party has had an opportunity of establishing his title by proceedings before another tribunal. And I think the court would take a very improper course, if it were to listen to a plaintiff who comes forward at the hearing, and asks to have his title put in a train for investigation, without stating any satisfactory reason why he did not make the application at an earlier stage. When he comes forward upon an interlocutory motion, the court puts the parties in the way of having their legal title investigated and ascertained; but when a plaintiff has neglected to avail himself of the opportunity thus afforded, it becomes a mere question of discretion, how far the court will assist him at the hearing, or whether it will then assist him at all.

If, indeed, any circumstances had occurred to deprive him of that opportunity in the progress of the cause, the question might have been different. But in this case I have not heard any reason suggested why the plain and ordinary course was not taken by the plaintiffs, of previously establishing their right at law. They might have brought their action before filing the bill, or they might, after the bill was on the file, have had their right put in a train for trial. Instead of that, they have allowed the suit to remain perfectly useless to them for the last four years. They knew of the alleged infringement in the month of August, 1835; and from that time till the hearing there was no moment at which they might not, by applying to the court, have had liberty to bring an action to establish their title at law.

It is obvious that such a line of proceeding exposes a defendant to [\*439] inconveniences which are by no means \*necessary for the protection of the plaintiff. It is no trifling grievance to a defendant to have a chancery suit hanging over him for four years, in which, if the court shall so determine at the hearing, he will have to account for all the profits he has been making during the intermediate period. Is a defendant to be subject to this annoyance without any absolute necessity, or even any proportionate advantage to his adversary, and without that adversary being able to show any reason why he did not apply at an earlier time? It appears to me that it would be very injurious to sanction such a practice, more especially when I can find no case in which the court has thought it right to retain a bill, simply for the purpose of enabling a plaintiff to do that which these plaintiffs might have done at any time within the last four years.[4]

It was much more regular and proper that the plaintiffs should have taken steps for putting the legal right in a course of trial. Those steps they have not chosen to take; and it is now impossible to put the defendants in the

[4] Injunction refused on the ground of delay, in cases of copyright. *Baily v. Taylor*, 1 Myl. & Cr. 73. *Lewis v. Chapman*, 3 Beav. 133. 2 Sim. & Sta. 10, n. 1.

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 1840.—*In re Badcock*.
 

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same position in which they would have stood if such a course had been originally adopted.

For these reasons I am of opinion, that the Master of the Rolls, finding that the evidence in the cause was not such as he could act upon with safety, came, in the exercise of his discretion, to a sound conclusion, when he refused to grant the injunction or retain this bill.

I have purposely abstained from saying any thing as to the legal rights of the parties, because I do not think the case is in such a state as to enable me to adjudicate upon it.

The appeal must be dismissed with costs.[5]

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\**IN RE BADCOCK, a Lunatic.*

[\*440]

1840: May 25.

The ordinary repairs upon a lunatic's real estate, will be directed to be borne by the personal estate; but any extraordinary outlay of the personal estate on the land, should retain its character of personalty.

THIS was an application to confirm the master's report, approving of certain repairs to freehold houses, the property of the lunatic, at the expense of his personal estate.

Mr. G. A. Young, on the part of the next kin, objected that if the application were granted, it would have the effect of changing personal into real estate, to the advantage of the heir at law, and the prejudice of the next of kin; and he referred to a case of *In re Harris*, 9th August, 1827,(a) where money having been expended in rebuilding a farm house, the amount was ordered to be considered and taken as a charge upon the lunatic's real estate.

THE LORD CHANCELLOR said, that if the money were laid out in the purchase of land, or, what would amount to the same thing, in building a farm house, it would be right that the sum so laid out should retain its character of personalty; but the case before him was one of ordinary and necessary repairs: and he made the order as prayed.[1]

(a) Shelford on Lunacy, p. 203.

[5] "The practice of the court of equity is, to grant an injunction upon the filing of the bill, and before a trial at law, if the bill state a clear right, and verify the same by affidavit. If the bill states an exclusive possession of the invention or discovery for which the plaintiff has obtained a patent, an injunction is granted, although the court may feel doubts as to the validity of the patent. But if the defects in the patent or specification are so glaring that the court can entertain no doubt as to that point, it would be most unjust to restrain the defendant from using a machine or other thing which he may have constructed, probably at great expense, until a decision at law can be had." *Washington, J. Isaacs v. Cooper*, 4 Wash. C. C. Rep. 260; *Collard v. Allison*, post, 487; *Barnard v. Wallis*, Cr. & Ph. 85. What the plaintiff's affidavit should state, see *Sturz v. De La Rue*, 5 Russ. 322.

[1] The governing principle in the management of a lunatic's estate is his interest, not that of those who may have eventual rights of succession. *In the matter of Salisbury*, 3 Johns. Ch. Rep. 347; *In re Ashley*, 1 Russ. & M. 371, 376, n. 1; *King v. Strong*, 9 Paige, 99.

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 1839.—In re Whittaker.
 

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[\*441]                   \*IN RE WHITTAKER, an alleged Lunatic.

1839 : May 25.

In a competition between the brother and the wife of an alleged lunatic for the carriage of the commission, the Lord Chancellor gave a preference to the brother, on the ground that in the particular case, the wife had an interest in preventing the proof of the lunacy being carried back beyond a certain period.

IN this case two petitions were presented, praying that a commission of lunacy might issue. One was the petition of the brother of the alleged lunatic, the other that of his wife ; and each asked to have the carriage of the commission. The fact of the insanity was not disputed, the only question being as to the time to which it was to be carried back.

Mr. *Wigram* and Mr. *Piggott*, in support of the brother's petition, stated that the unsoundness of mind existed antecedently to the execution of a will which the lunatic had made, giving benefits to his wife, and that their client would be able to prove that fact upon the inquisition, if he were intrusted with the carriage of the commission.

Mr. *Spence* and Mr. *Wood*, for the wife, contended that the sole object of the brother was to obtain a sweeping inquiry at the expense of the estate, with a view to establish the fact of the lunacy at a period overreaching the will, so as to get rid of that instrument by a side-wind ; and they submitted that, according to the doctrine laid down in a recent case,<sup>(a)</sup> the court would look only to the interest of the lunatic and not suffer a party to effect any indirect and collateral object, for his own benefit, through the medium of proceedings in the lunacy.[1]

[\*442]   \*THE LORD CHANCELLOR observed, that the law required, and the jury were bound to ascertain, the period at which the lunacy commenced. The wife, however, who denied or questioned the unsoundness of her husband's mind at the time when he made his will, had an interest in not carrying the lunacy so far back as the date of the will ; and as the affirmative lay with the brother, his lordship was of opinion that he should have the carriage of the commission.[2]

(a) *In the Matter of J. B.*, 1 Mylne & Craig, 538.

[1] See the preceding case and note *ibid*.

[2] An application by a mortgagee of an alleged lunatic's estate to be allowed to attend by counsel at the inquisition was refused, the applicant declining to be bound by the result of the proceedings. *In the matter of Watts*, 1 Phillips, 512. A petition for a similar object was afterwards presented by the presumptive heir of the alleged lunatic, suggesting that the latter had, after the commencement of his lunacy, made a will in favor of his wife, and on that ground praying leave to intervene in the proceedings. Lord Lyndhurst : " I do not think there is any case to be found in which a party has been allowed to intervene for an object of the kind here stated : I mean where the object is not to benefit the lunatic, but the party himself who makes the application." *Ibid*.



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 1839.—Cherry v. Boulton.
 

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## CHERRY v. BOULTBEE.

1839: June 19 ; November 22.

T. being indebted to his sister C., became a bankrupt: shortly afterwards, C. made her will, and thereby gave certain sums to her trustees and executors, as pecuniary provisions for the benefit of T., in a form apparently intended to exclude the claims of creditors. She never proved her debt against the bankrupt's estate, and died before he obtained his certificate. On a bill by the assignee against the executors of C. for payment of the money bequeathed for the use of the bankrupt, the Lord Chancellor held, affirming the decree of the Master of the Rolls, that the executors were not entitled to set off the amount of the unproved debt against the demand of the assignee.

THE facts of this case are very fully stated in the report of the cause upon the hearing at the Rolls,<sup>(a)</sup> and they are also shortly recapitulated in the Lord Chancellor's judgment.

The Master of the Rolls having decided that the defendants, the executors of Catherine Frances Boulton, were not entitled to set off the legacies given by her will for the use of her brother Thomas Boulton, an uncertificated bankrupt, against the debt due from him to her at the time of his bankruptcy, an appeal was brought against that decision.<sup>[1]</sup>

*The Solicitor General* and Mr. *Cole*, for the plaintiff, in support of the decree.—“In all cases where the principle of set-off has been applied [\*443] in this court, from *Jeffs v. Wood*,<sup>(b)</sup> downwards, with the single exception of *Ex parte Man*,<sup>(c)</sup> which is of questionable authority, this material circumstance occurred, which at once entirely distinguishes them from the present ;—that, at the time of the bankruptcy, a clear case of set-off existed between the parties, which the fact of the supervening bankruptcy was not permitted to alter or affect. Here there was a debt due to Catherine from her brother Thomas, but nothing was ever due to Thomas from her or her estate, and no dealing or circumstance took place in respect of which such a debt, either perfect or inchoate, could possibly arise. Catherine never proved her debt against the bankrupt's estate. Her object in giving the legacies evidently was to secure a personal provision for her brother; and if she had lived until after he obtained his certificate, that object would have been accomplished; but she never could intend that the debt due from him was to be set off against the benefits given him by her will; because that would in effect be to render the provision nugatory, and defeat the very end she had in view.

(a) 2 Keen, 319.

(b) 2 P. Wms. 128.

(c) Mont. &amp; Mac. 210.

[1] The above paragraph is an instance how the meaning of a sentence may be perverted, either through the negligence of the writer, or printer, by the transposition of a single word. As it now stands, it is just the reverse of what the Master of the Rolls did decide. Put the word “*against*” in its proper place, and all is consistent. Read the sentence as follows:—“The Master of the Rolls having decided that the defendants &c. were not entitled to set off *against* the legacies given by her will for the use of her brother Thomas Boulton an uncertificated bankrupt, *the debt due from him to her &c.*”

1839.—Cherry v. Boulton.

It is impossible to maintain that if the bankrupt had obtained his certificate he must still have discharged the debt (which, in fact, the bankruptcy had barred,) before claiming payment of the legacies; and until that time arrived, the assignee, who represents the bankrupt, with all his rights and liabilities, cannot stand in a less favorable position. Observe the situation of the parties at the death of the testatrix: the right of the assignee to the legacies depended on the operation of the bargain and sale, which, at the time [\*444] of its execution, passed not only all the then present, but all the after acquired, personal estate of the bankrupt, including the legacies in question, which, however, came to him, unlike the property vesting at the bankruptcy, unclogged and unaffected by any equities whatever.

Mr. *Wigram* and Mr. *Loftus Wigram*, in support of the appeal.—Every principle of natural justice is in favor of the defendants' claim; the proposition on the other side being that, whereas this legacy is to come out of the testatrix's estate, and a sum *per contra* is due to that estate from the estate of the bankrupt, the assignee is to take the legacy in full, and yet keep the property in his hands, without any deduction on account of the debt. This never can be in accordance with the maxim, that he that will have equity must do equity.

The question then is, first, whether the defendants' claim is opposed to any rule or principle of law; and, secondly, if it be not, whether there was any thing in the intention of this testatrix, as evidenced by her will, which should lead to an opposite conclusion.

Upon the first point, it is perfectly settled that, if the testatrix had died before the bankruptcy, the doctrine of set-off would clearly have applied; a doctrine not originating, as has been supposed, in the provisions of the bankrupt acts, which relate to the case of mutual debts and credits, and were only intended to extend the jurisdiction at law, but introduced long before into this court, in consonance with the principles of natural equity: *Jeffs v. Wood*,<sup>(a)</sup> *Ranking v. Barnard*,<sup>(b)</sup> *Richards v. Richards*.<sup>(c)</sup> In [\*445] *Ex parte Blagden*,<sup>(d)</sup> which was referred to in the court below as an authority for the plaintiff, and where it was decided that the debt due from a bankrupt to a married woman *dum sola*, could not, in bankruptcy, be set off against a debt due from her husband to the bankrupt, Lord Eldon's judgment proceeds on the ground that the right to receive and the liability to pay were not in the same parties; but his lordship there expressly recognized the principle that assignees in bankruptcy take subject to all the equities which would have attached upon the bankrupt in case he had continued solvent; and in *Ex parte Hanson*<sup>(e)</sup> the same doctrine is laid down by Lord Erskine. This court has lately gone so far as to apply the principle to a case where a person who had covenanted to settle a sum of money, in trust for himself for life, with remainders for the benefit of his wife and children,

<sup>(a)</sup> 2 P. Wms. 128.<sup>(b)</sup> 5 Mad. 32.<sup>(c)</sup> 9 Price, 219.<sup>(d)</sup> 19 Ves. 465; and 2 Rose, 249.<sup>(e)</sup> 12 Ves. 346.

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having afterwards become a bankrupt, the trustees proved against his estate for the amount, and were then allowed to retain the interest accruing upon the dividend recovered under such proof, until the whole fund should be replaced, without making any payment to the assignee in respect of the life interest of the bankrupt: *Ex parte Turpin*.<sup>(a)</sup> This case, which only followed out the doctrines laid down by Sir W. Grant in *Priddy v. Rose*,<sup>(b)</sup> was not, strictly speaking, a case of set-off, but rather of stoppage or retainer, and was grounded on the equity to which the husband was subject, that he should derive no benefit from his contract until he had fulfilled that which he had stipulated to do on his part: precisely the same principle applies here. In *\*Ex parte O'Ferrall*,<sup>(c)</sup> executors were held to be [\*446] entitled to set off one moiety of a legacy given by the testator to the bankrupt's wife against a debt due to their testator from the bankrupt, and the other moiety was ordered to be put in settlement. The decision of the Vice-Chancellor in *Ex parte Man* is directly in point, the case being, in fact, identical with the present, with this immaterial difference only, that the will there bore date before, whereas here it was made a few days after the bankruptcy. The present is a peculiarly strong case, because it is the very circumstance of this debt not having been paid which has occasioned the deficiency of assets to satisfy the legacies in full.

Upon the second point there is not the slightest trace of any thing indicating an intention, on the part of the testatrix, unfavorable to the application of a set-off. Her will was made only a few days subsequently to the bankruptcy; and there is no evidence to show that she knew any thing of that event, or had it or its legal consequences at all in contemplation at the time when she directed the provisions in it to be made in her brother's favor. The question must, therefore, be determined solely upon general principles.

*The Solicitor General*, in reply.

Nov. 22.—THE LORD CHANCELLOR:—Prior to the month of November, 1821, Thomas Boulton was indebted to his sister Catherine Frances Boulton. In November, 1821, a commission of bankruptcy issued against Thomas Boulton, under which the \*plaintiff is assignee. [\*447] Catherine Frances Boulton did not prove any debt under this commission.

In December, 1821, Catherine F. Boulton made her will, and bequeathed to trustees for Thomas Boulton, a sum exceeding the amount of the debt due to her from him, and attempted to secure it to him, by providing that it should not be anticipated or assigned by him, or be liable to his debts.

Catherine died in January, 1823, and Thomas died in December, 1833,

(a) Mont. 443.

(b) 3 Meriv. 86; and see also *Ex parte Graham*, 3 Ves. & B. 130; *Ex parte Hebb*, 19 Ves. 22; *Ex parte Bignold*, 2 Mad. 470.

(c) 1 Gl. & Jam. 347.

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 1839.—Cherry v. Boulton.
 

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never having obtained his certificate. The plaintiff, as assignee of Thomas, claimed the legacy. The defendants, as executors of Catherine, claimed to set off the debt due from Thomas to Catherine; and whether there is a right so to do, is the question in the cause.

It must be observed, that the term "set-off" is very inaccurately used in cases of this kind. In its proper use, it is applicable only to mutual demands, debts and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor, to pay a debt due from him to the creditor's estate, is rather a right to pay out of the fund in hand, than a right of set-off. Such right of payment, therefore, can only arise where there is a right to receive the debt so to be paid; and the legacy or fund, so to be applied in payment of the debt, must be payable by the person entitled to receive the debt.[2]

In the present case, however, the bankruptcy of the debtor having taken place in the lifetime of the testatrix, her executors never were entitled to receive from the assignee more than the dividends upon the debt; and [\*448] although the bankrupt had not obtained his certificate, \*and the liability incident to that state remained upon him, yet he, for the same reason, was never entitled to receive the legacy; and consequently, there never was a time at which the same person was entitled to receive the legacy and liable to pay the entire debt; the right, therefore, of retaining a sufficient sum out of the legacy to pay the debt can never have been vested in any one. The assignees who claim the legacy would, indeed, have been liable to the payment of any dividend upon the debt, had it been proved; and the Master of the Rolls proposed to the executors to make provision for deducting the amount of such dividend from the amount of the legacy.

In all the cases referred to, except that of *Ex parte Man*,<sup>(a)</sup> the liability to pay the debt and the right to receive money had been at some time vested in the same person; and all that the court did in those cases was to consider that the party liable to pay the legacy had actually done what the law considers him entitled to do, namely, to apply a sufficient part of the legacy to payment of the debt.

In *Ex parte Blagden*,<sup>(b)</sup> a creditor of the bankrupt was not permitted to set off a debt which the bankrupt owed against a debt in which the creditor became indebted to the assignees of the bankrupt, in right of the bankrupt, subsequently to the commission. In *Ex parte Man*, indeed, the case was different, the facts of that case being as nearly as possible the same as the present.

Between these two inconsistent decisions, that of the Vice-Chancellor in *Ex parte Man*, and that of the Master of the Rolls in the case now

(a) Mont. & Mac. 210.

(b) 19 Ves. 465.

[2] No rule is better understood, than that you cannot set off demands due in different rights; the principle being, that one man's money shall not be applied to pay another man's debt." Wigan, V. C., *Jones v. Mossop*, 3 Hare, 574.

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 1839.—*Ansdell v. Ansdell.* *Gompertz v. Ansdell.*


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before me, I have \*no hesitation in preferring the principle of the [\*449] latter, and must therefore affirm it; but as the appellants had the case of *Ex parte Man* to support their appeal, I do not think they ought to be ordered to pay any costs to the respondent.[3]

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### ANSDELL v. ANSDELL. GOMPERTZ v. ANSDELL.

1839: November 6, 9, 11, 12, 13, 15, 18. 1840: January 13.

Where, upon an interlocutory application, an issue has been directed to try a question of fact upon which the title of the parties depends, and a verdict has been found in favor of one party, which the court, on a motion for a new trial, refuses to disturb, the other party may, notwithstanding, proceed with the cause, and go into evidence in support of his case, in opposition to the finding of the jury; and if, at the hearing, his evidence is sufficient to raise a reasonable doubt of the correctness of the verdict, the same question will be sent to another jury. But the inconveniences of this course are so great that the court will be strongly inclined, when it grants such an interlocutory issue, to require from both parties an undertaking to be bound by the result.

THE right to the property in contest in these causes depended solely upon a question of pedigree. Upon a motion to dissolve an injunction which had been granted by the Master of the Rolls, and by which the adult defendants in the second cause were restrained from receiving the dividends on certain sums of stock standing in trust in the cause of *Ansdell v. Ansdell*, the Lord Chancellor directed an issue for the purpose of trying whether a person named Henry Gulling Isaac, through whom the defendants the Ansdells derived their title, was born before or after the marriage of his reputed parents.

Upon the trial of the issue, the jury found a verdict for Lyon Gompertz, the plaintiff in the second suit, and thereby in effect declared, that Henry Gulling Isaac was illegitimate. The defendants in that suit, who had been \*the plaintiffs in the issue, thereupon moved, before the Lord [\*450] Chancellor, for a new trial; but his lordship expressed himself satisfied with the verdict, and refused the motion with costs. In consequence of certain facts which came out in the course of the discussion upon that occasion, and which gave rise to a strong suspicion that gross fraud and deceit had been practiced by persons connected with the suit of *Ansdell v. Ansdell*, for the purpose of getting out of court a part of the funds in contest, his lordship, at the same time, directed that all the papers in these causes should be laid before the Attorney General, with a view to his considering whether any criminal proceedings should be instituted with reference to such fraud.

In Hilary term, 1838, an *ex officio* information in the Court of Queen's Bench was filed by the Attorney General against the defendants William Ansdell and Harriet his wife, and George Ansdell and Maria his wife, and also against three other persons of the names of Dean, Grant, and Slade, in which they were all charged with conspiring to defraud the plaintiff Gom-

[3] *Clark v. Cort*, Cr. & Ph. 154. *Rawson v. Samuel*, id. 161. *Jones v. Mossop*, 3 Hare, 568.

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1839.—*Ansdell v. Ansdell. Gompertz v. Ansdell.*

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pertz of the funds in the Court of Chancery to which he was entitled, and also to deceive the officers of the court.

This information, which was tried before Lord Denman and a special jury on the 20th, 21st, 22d, 23rd, and 24th days of June, 1838, again, necessarily though collaterally, raised the question of Henry Gulling Isaac's legitimacy, and the title of the Ansdells as depending upon that fact; and in support of the affirmative of the proposition, some additional evidence, which had not been admitted upon the trial of the issue, was brought forward by the defendants in the information, to assist their defence.

[\*451] \*The Lord Chief Justice having told the jury, in his address to them, that it was necessary they should find a distinct verdict both as to the question of legitimacy and as to the conspiracy, the jury, by their verdict, found that Henry Gulling Isaac was legitimate, and they acquitted all the defendants, with the exception of Dean and Slade; in whose favor, however, a verdict of acquittal was also eventually directed to be recorded.

In consequence of the result of the *ex officio* information, the defendants, the Ansdells, renewed their application, before the Lord Chancellor, for another issue, to try the legitimacy of Henry Gulling Isaac. Upon that application, his lordship said he could not look at the verdict upon the information as a verdict in the cause, although it might be a ground for inducing the court to put the matter in a train for further inquiry at a proper stage; and his lordship directed the motion to stand over, with a view to see that the plaintiff in *Gompertz v. Ansdell* prosecuted the cause with due diligence in order to bring it to a hearing, and gave the parties liberty to apply.

Accordingly, the parties in the cause of *Gompertz v. Ansdell*, proceeded regularly with the suit, and both of them went at large into evidence in support of their respective cases.

The great bulk of the evidence, taken on behalf of the defendants, consisted of the depositions of persons who had been examined on the trial of the former issue; but some part of it also consisted of entries in the journals and professional account books kept by certain medical men, who had attended the mother of Henry Gulling Isaac at or about the time of his sup-  
[\*452] posed birth, and of the testimony of some further witnesses, \*which evidence had either not been tendered, or had been rejected by the learned judge before whom the issue was tried.

The cause of *Gompertz v. Ansdell* having now come on to be heard, it was contended for the plaintiff that the course followed by the defendants in going into evidence upon the case, after the finding of the jury against them—a finding with which the court had declared itself entirely satisfied—was altogether unprecedented and contrary to practice; and that the verdict, not having been disturbed, must be considered as final and conclusive between the parties. There was nothing, besides, in the additional evidence which could raise a reasonable doubt as to the correctness of the former verdict, or lead the court to distrust the soundness of the conclusion at



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which it had arrived upon the motion for a new trial. Under such circumstances, to direct another issue would be merely to prolong an expensive and vexatious litigation, without any chance of a different result.

On the other hand, it was argued, that there was no principle of equity or rule of practice which precluded the defendants from the course which they had taken. The former issue was merely preliminary, and intended to assist the court in arriving ultimately at a safe conclusion; but the hearing was the time at which the parties were expected, and indeed bound, to establish the cases which they respectively set up by the best evidence in their power. And here the defendants, who had availed themselves of all the lights afforded by the former trial and the subsequent proceedings, to discover and bring forward further evidence tending materially to support their title, were not to be prejudiced, and certainly not concluded, by the result of the interlocutory inquiry. The additional evidence since obtained, and now submitted for the first time to the court, was of so important a kind as, if it did not entitle the defendants (which they contended that it did) to an immediate decree in their favor, at any rate made it imperative on the court to send the question to another jury, before whom the facts might be thoroughly investigated, with all the advantages to be derived from the new matter which the industry of the defendants had enabled them to adduce.

Mr. Serjt. *Bompas*, Mr. *Wigram*, and Mr. *Richards*, for the plaintiff *Gompertz*.

Mr. *Tinney*, Mr. *Stuart*, Mr. *Halcombe*, and Mr. *Parry*, and Mr. *Erle* and Mr. *Collins*, for the different defendants.

1840: Jan. 13.—THE LORD CHANCELLOR:—This case came before me at the hearing under very peculiar circumstances.

Upon an interlocutory application, an issue was directed to try whether Henry Gulling Isaac was the legitimate son of Joseph Isaac. Now to direct an issue of fact upon an interlocutory application is a very common proceeding in this court; and, generally speaking, such an issue is conclusive between the parties; for persons who have had ample opportunity of bringing before a jury such evidence as they may think material to their case, are generally satisfied with the result; at least if the result of the investigation before the jury be such as not to lead to an order for a new trial.

In the present case, however, the defendants, going on with their cause, went into evidence, as unquestionably they had a right to do, [\*454] on the same matter of fact on which the issue had been directed; and they have brought on the cause to a hearing, no doubt with the burden of the finding of the jury against them, but laying also before the court such other facts as, upon the hearing, they have been able to adduce by way of evidence.

Now that the verdict founded on the interlocutory application is not con-

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clusive—conclusive in point of law it cannot be—but conclusive, I mean, according to the practice of this court, I apprehend is free from all doubt. It is a matter of extreme importance, undoubtedly, in any subsequent investigation; but it is merely that which it would be at law; namely, a matter of evidence, but not conclusive evidence, between the parties. Of necessity, therefore, the defendants here were at liberty to go into the case which they had made, and, if possible, to raise sufficient doubt in the mind of the court as to whether the result of the former investigation had been so satisfactory as to justify the court in acting upon that finding and that result, without additional and further investigation. It is obvious that this course of proceeding is open to very grave objection and to very great danger; and it will deserve the consideration of those before whom similar causes may come in future—certainly, if any such cause should come before me, I shall give it my most serious consideration before directing any issue on an interlocutory application,—whether such an issue should be directed without putting the parties to an undertaking to abide by the result.

The mere circumstance of an issue being necessary to enable the court to deal with the interlocutory application is of itself sufficient to support an order for an \*injunction, until the parties shall be in a situation to try the facts. A plaintiff can very seldom, if ever,—indeed I know not that he can ever—be in a situation to render it necessary for him to ask for such an issue. The doubt which directs and is the ground of such an issue assumes that it would be sufficient for his purpose. On the other hand, the defendant may be very deeply interested in having what he asserts to be his rights not interfered with, without the opportunity, at the earliest possible moment, of having those rights put into a course of investigation and trial; and the defendant, therefore, can never complain that the option is tendered to him of submitting to have his rights, if they do exist, suspended by an injunction, or of proceeding to an immediate trial, undertaking that the result of that trial, subject to the jurisdiction of the court as to any application for a new trial, shall be conclusive upon the rights of the parties. As at present advised, and according to the opinion I at present entertain, it will be very difficult to induce me, after the experience I have had in this cause, to direct any issue on interlocutory application, without calling on the defendant to treat the result as conclusive of the case on the matter of fact.

That, however, was not the course adopted in this instance. The issue went to trial in the ordinary way, without any such undertaking being given on either side; a circumstance which, of course, made it competent, and indeed necessary, for both parties, if they wished at all to bring before the court a different view of the case from that which the court had the opportunity of considering on the former proceeding, to go into new evidence as to matters of fact upon the question in contest between them.

[\*456] \*Now if those matters of fact had been varied only by bringing other witnesses to give similar evidence to that which had been

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1840.—Ansdell v. Ansdell. Gompertz v. Ansdell.

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given before the former jury, in all probability I should not have thought that the case was one in which sufficient doubt had been raised of the propriety of the former verdict, to render it my duty to send it to a further inquiry. This observation I make particularly with reference to the danger to which I have already adverted. But there are certain matters of evidence now produced which were not submitted to me before, and which were not submitted to the jury before, and which not only appear to me to be entitled to considerable attention, but which may also have considerable effect in enabling the jury to come to a satisfactory conclusion as to the degree of credit which is due to several parts of the oral testimony. The case, as it is now presented, has never been presented to a jury. The jury have found a verdict on the case then presented; but the case before me is so far varied by the additional evidence which has been since adduced, that I cannot say, there has been a finding by a jury on the case as it now exists.

That the question is one which this court would, as a matter of course, send to a jury, if there had not been the verdict in the interlocutory issue, is beyond all doubt; although at the bar, in the eagerness of argument, counsel have suggested, that the case was so clear that I should now be in a situation to decide upon it against the verdict which has been found. But no course of practice shows that, in a question of this sort, the court ever does take upon itself to act without the intervention of a jury; the result being altogether dependent on the credit due to the evidence, which, taking it even in the most favorable view for the party on whose behalf it is produced, is a matter of serious consideration, to be \*determined by a [\*457] jury, with all the advantages which a jury, with the assistance of a judge, enjoys, and of which this court is destitute.

The sole question, therefore, which, on reviewing the proceedings in this cause, and the evidence now laid before me, I have had to consider, is, not whether there was a case for an issue, if I had been now at the hearing, without having had any previous trial; but whether the new evidence laid before me is such as to render it my duty not to conclude the parties by the verdict which has been had on evidence, in my opinion, differing in many respects from that which the jury had before them on the former trial. And upon the whole, as I cannot satisfy myself that the verdict upon another trial will be necessarily the same as that which it was upon the former state of the evidence—although I greatly regret that the former order was not such as to make the result binding on the parties, as, in point of form, it certainly was not—and looking to the evidence, and giving all due weight to the verdict which has been obtained on the one side, and to the evidence now adduced on the other, I think I should run the risk, at least, of miscarrying in the adjudication of property of very great magnitude, if I did not send this case to be again submitted to the investigation of a jury.

Having stated the grounds on which I think a new trial must be had, namely, that there has been no verdict on the case as now presented, I should

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have contented myself with saying thus much, were it not that some observations have been thrown out at the bar, which rendered it impossible for me to leave the case without adding one further remark which I make [\*458] only to guard against an inference which possibly might \*otherwise be drawn. Observations were thrown out which I did not, for my own part, consider to be at all material to the present question, I mean with respect to the course of the summing up of the learned judge at the former trial, and with respect to what subsequently passed in this court on my refusing the application for a new trial. Now I beg it may be distinctly understood, that I do not direct a new trial upon any such grounds. On reviewing the proceedings at law, and reconsidering the proceedings in the case as it afterwards came before me—I am not now adverting to any particular expressions that may have fallen from the learned judge or from myself—but on reviewing those proceedings generally, I think both the one and the other were entirely proper; and if the case came again to be presented to me on the same facts that were presented to me before, I should adopt precisely the same course. The strength of the case of those who ask for a further investigation depends, not upon showing that the former proceedings were erroneous—I think they were not so—but on showing that the case now presented is different from that which was before presented to the court.

The case will therefore go to a trial,—I do not call it a *new* trial, but another trial of the same issue, directed on the hearing,—without any prejudice thrown upon the former proceeding by anything which has passed on the present occasion. Of course, the verdict will have such effect as at law it ought to have; and it will have neither more nor less, in consequence of any thing that has fallen from me. The issue will be in the same words as it was before.

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The issue was tried at the spring assizes for the county of Devon, [\*459] before Mr. Justice Coltman and a special jury, \*on the 20th, 21st, 23d, 24th, and 25th days of March, 1840, when a verdict was found in favor of the legitimacy of Henry Gulling Isaac.

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A motion was afterwards made before the Lord Chancellor for a new trial, and his lordship granted the application. That trial has not yet (March, 1841) taken place [1]

[1] In a case in which a question arose as to the validity of a marriage, which was upon an interlocutory application referred to a master to inquire and report upon, Shadwell, V. C. said: “The order of June, 1839, by which the master was directed to inquire into and report as to the validity of the several marriages, was made under these circumstances. An infant’s bill had been filed; and then a bill of revivor and supplement was filed, in which the infant described herself as the wife of S. W. Obviously therefore it was necessary to know whether she did sustain that character or not. Independently of any question about property, the court must know whether the infant has the character in which she professes to sue. Thus, in Mr. Bowes’s case, (2 J. & W. 541,) where that gentlemen thought proper to file a bill stating himself to be Earl of Strathmore, Lord Eldon

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*\*Between* JOHN WOOD, THOMAS PHILPOT WOOD, THOMAS BUR- [\*460]  
TON LUCAS, BERNARD MAYNARD LUCAS, and ELIZA his Wife,  
(formerly ELIZA WOOD,) by her Husband and next Friend, the said BER-  
NARD M. LUCAS, Plaintiffs; *and* THOMAS WHITE, Defendant.

1833: December 7, 8. 1839: January 17.

A testator, by his will after disposing of three one-fifths of his residuary real and personal estate, gave another one-fifth in trust for his son William and his children; and the remaining one fifth in trust for his daughter till twenty-five or marriage; with a direction, that if she married under that age, her fifth should be conveyed and settled upon the trusts therein mentioned; and he gave the trustees a general power of sale during the continuance of the trusts thereby reposed in them. William survived the testator, and died, leaving infant children; and, upon the daughter's marriage under twenty-five, a settlement was executed, which, reciting that no part of the real estate had been sold, though it was intended that the same should be sold under the power contained in the will, assigned to trustees, their executors, &c. all the daughter's share of the moneys to be produced by the sale of the real estate, upon certain trusts in favor of her intended husband, herself, and her issue:

Held, as to William's fifth, that the power of sale under the will continued after his death; and that, although, as to the daughter's fifth, the power had determined upon her marriage, yet the settlement created a new power of sale by implication.

Whatever objections may exist to an indefinite power of sale, on the ground of its tending to a perpetuity, such objections, if any, will not prevent the valid exercise of the power during the continuance of limitations which are within the prescribed legal limits; *Semble*.

To a common bill for the specific performance of a contract of sale, the parties to the contract are the only proper parties.

THIS was an appeal from a decree of the Master of the Rolls.

The facts of the case, together with the substance of the will and marriage

said that it was absolutely necessary before the case proceeded, to have that fact ascertained; and accordingly his lordship directed that proceedings should be taken in the House of Lords for the purpose of determining that question. Besides there was another reason which induced me to direct the reference, and that was, that where the court sees that there is a question which must be determined sooner or later, it has thought it right to direct an interlocutory proceeding, in the first instance, which will have the effect of determining the question. That was the course adopted by Lord Eldon in *Golden v. Ulyate*. [not reported.] The circumstances of that case were as follows: the plaintiff claimed to be the next of kin of an intestate, and filed a bill for an account of the intestate's estate. The defendant insisted that the plaintiff was illegitimate. Upon a motion being made for a receiver, in 1809, his lordship directed an issue to try the question of legitimacy, although it was strongly urged that the court was acting irregularly, and ought not to direct such a question to be tried until the hearing. But Lord Eldon said that the question must be tried sooner or later, and that he would not wait until the hearing, but would direct the issue in the first instance." On the case in the text being urged, the Vice-Chancellor observed: "I have no doubt that it was right in *Gompertz v. Ansdell* to direct at the hearing, that the issue granted on the interlocutory application should be tried over again. But in *Golden v. Ulyate*, Lord Eldon, in 1811, refused a motion for a new trial; and when the cause was heard in 1820, the defendant asked for another issue, but his lordship refused to grant it; so that he abided himself, and made the parties abide by the verdict found on the trial of an issue directed on an interlocutory application. If the order of June, 1839, was wrong, why was it not appealed from?" And subsequently the Vice-Chancellor says: "Now it certainly was held by Lord Eldon in *Golden v. Ulyate*, (a case which I mentioned before and in which I was counsel,) that when the court sees that there is a question which must be decided sooner or later, it may, on an interlocutory application, direct either an issue or an inquiry, for the purpose of determining that question; and in this case I do think it necessary, for the pur-



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settlement, upon which the question arose, are shortly stated in the report upon the hearing of the cause at the Rolls ;(a) but the line of argument which was taken on the appeal, and which the Lord Chancellor subsequently [\*461] took occasion to "consider and discuss in his judgment, renders it desirable that the case should be re-stated, and the instruments set out somewhat more at large.

John Wood, the testator in the cause, by his will, bearing date the 2d of May, 1816, and duly executed and attested to pass freehold estate after making certain specific and pecuniary bequests, devised to his wife Ann Wood, for her life or widowhood, a messuage or dwelling house, and other hereditaments therein mentioned ; and as to the said messuage and heredita-

pose of going on with these causes. that the court should know in what character the lady stands. It has been said that my opinion on this point differs from that which the Lord Chancellor expressed in a recent case. But if so I am borne out by the authority of Lord Eldon, upon which I have often acted in this court ; and I am not aware that any decision of mine upon the point has been ever appealed from. I think that an end ought to be put to the question as soon as possible." *Kent v. Burgess*, (1840,) 11 Sim. 361, 371, 372, 377. In a subsequent case (Jan. and Feb. 1842,) Wigram, V. C. expressed himself strongly in favor of an early trial of questions which must ultimately be tried. "I agree in the suggestion of the Real Property Commissioners, that where a case must be determined by a court of law, it is better that the trial should be directed as soon as the issue is joined between the parties, although possibly there may have been some evidence to be gone into in this court ; otherwise, the devisee goes into evidence which, if disputed, turns out to be an useless expense, productive not only of delay, but often of very serious mischief. In addition to this, the value of the evidence is usually lessened by subjecting witnesses to repeated examinations. The case of *Gompertz v. Ansdell* was a strong illustration of the inconvenience of the common rule." *Whitaker v. Newman*, 2 Hare, 302. In a still later case (March, 1843) in which an issue had been directed on motion and before hearing, Vice-Chancellor Wigram again expressed his view of the subject as follows : "The effect of an issue directed upon an interlocutory proceeding is not necessarily to conclude the parties upon the fact to which the issue relates. The parties, unless bound by any special undertaking (which Lord Cottenham, in *Gompertz v. Ansdell* seems to consider that it would be proper to require,) may enter into evidence in this court for the purpose of supporting or displacing the facts found upon the trial of the issue. The course taken in *Gompertz v. Ansdell* shows that an issue so directed is not necessarily final. In that case it was left open to this consideration—that the issue might have been directed exclusively for the purpose of determining the motion, and not with the view of laying once for all, foundation for the judgment of the court at the hearing. But in this case there is no doubt as to the object of the issues ; it could only be with a view to the ultimate decision of the question in the cause. The issues have been tried, and the defendants admit, or at least do not now question the propriety of the verdict. I must in such circumstances, treat the issues as having the same effect as if they had been directed by the decree at the hearing of the cause." The decree was for the plaintiff upon the verdict in his favor. *Lewis v. Thomas*, 3 Hare, 26, 32. And again in a still more recent case (May and June, 1844, cited supra, p. 437, n. 3, for another purpose) Wigram, V. C. said ; "That with regard to directing an issue upon an interlocutory application, he understood the rule to be clearly laid down by Lord Eldon, that if the court could plainly see what the issue in the case was, it might properly direct that issue to be tried ; but it could not do so, if there was any doubt of what the issue might be. It was true, that until the answer was put in, the issue was not raised upon the pleadings ; but in this case the whole question had been fully brought before the court upon the affidavits, and had been amply discussed, so that the points in dispute were sufficiently and distinctly raised : he therefore saw no objection, either in form or substance, to directing an issue." *Cory v. The Yarmouth & Norwich Railway Co.* 3 Hare, 593, 607.

(a) 2 Keen, 664.



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ments, from and immediately after her decease or second marriage, and as to all other his messuages, lands, tenements, and real estate, and all and singular his personal estate, after payment of his debts, funeral and testamentary expenses, and legacies, and charged with a certain annuity to his wife, the testator gave, devised, and bequeathed the same, according to the respective natures thereof, and subject as aforesaid, as follows, that is to say; one full, equal, undivided fifth part or share (the whole into five equal parts or shares to be divided) of and in such real and personal estates, unto his son John Wood, his heirs, executors, administrators, and assigns, for ever: one other like equal undivided fifth part or share thereof unto his son Henry Wood, his heirs, executors, &c.: one other like equal undivided fifth part or share thereof unto his son Thomas Philpot Wood, his heirs, executors, &c.: one other like equal undivided fifth part or share thereof unto his said sons John Wood and Henry Wood, their heirs, executors, &c., upon trust that they, or the survivor of them, &c., should pay the yearly rents, dividends, and produce thereof unto his (the testator's) son William Wood, and his assigns, for his life, and from and immediately after his decease, should convey and assign the said last mentioned one-fifth part or share \*unto all and [\*462] every the child and children of his said son William Wood, thereafter to be born, as tenants in common, and not as joint tenants, and equally to be divided between and amongst them (if more than one) share and share alike, and their respective heirs, executors, administrators and assigns. And the testator thereby provided and declared that, in case any one or more of such children should depart this life under the age of twenty-one years, without leaving issue, then the part or share, or parts or shares, of him, her, or them so dying, of and in the said one-fifth part or share, should go and be conveyed and assigned unto the survivors or others, or survivor or other, of such children, as tenants in common, and not as joint tenants, and equally to be divided between and amongst them, (if more than one,) share and share alike, and their, his, or her respective heirs, executors, administrators, and assigns; and in case all such children should depart this life under the age of twenty-one years without leaving issue, or in case the testator's said son William Wood should have no child or children, then he gave, devised, and bequeathed the said last mentioned one-fifth part or share unto his said sons John Wood, Henry Wood, and Thomas Philpot Wood, and his daughter Eliza Lucas, then Eliza Wood, as tenants in common, and not as joint tenants, and equally to be divided between and amongst them, share and share alike, for the like estates, and the part, or share of his said daughter Eliza to be upon the like trusts and subject to the like provisoes and declarations, as were thereinbefore and thereafter by him given and declared of and concerning the original fifth parts or shares of his said sons John Wood, Henry Wood, and Thomas Philpot Wood, and his said daughter Eliza Wood respectively, of his said real and personal estates.

\*And the testator gave, devised, and bequeathed the remaining [\*463]

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undivided one-fifth part or share of his said real and personal estates unto his said sons, John Wood and Henry Wood, their heirs, executors, &c., upon trust that they or the survivor of them, &c. should, with the advice and concurrence of his said wife Ann Wood, if she should be living, pay and apply the yearly rents, issues, and produce of the said last mentioned one-fifth part or share, for and towards the maintenance, education, and support of his daughter Eliza, until she should attain the age of twenty-five years, or be married, which should first happen; and immediately upon her attaining the age of twenty-five years, if she should then be unmarried, should convey and assign the said last mentioned one-fifth part or share unto his said daughter, her heirs, executors, &c.; but in case his said daughter should marry before she should attain that age, then upon trust that his said trustees or the survivor of them, &c. should, immediately after such marriage, with such advice and concurrence as aforesaid, convey, assign, and settle all or such reasonable part or parts of the said last mentioned one-fifth part or share as they or he, with such advice and concurrence as aforesaid, should deem proper and expedient, to such uses, upon such trusts, and to and for such intents and purposes, for the benefit of his said daughter and her issue, and with such reasonable estates and interests in favor of any person or persons with whom she might intermarry, as they or he, with such advice and concurrence as aforesaid, should deem proper and expedient; and should convey and assign the residue or remainder of such one-fifth part or share (if any) unto his said daughter, her heirs, executors, &c., or unto such person or persons, and for such estate or estates, interest or interests, as she or they should by any writing or writings, under her or their

hand and seal, or hands and seals, direct or appoint. And the testator by his will [\*464] further provided, that in case as well all such children of his said son William Wood as aforesaid should depart this life under the age of twenty-one years without leaving issue, or he should have no child or children, and his said daughter Eliza should depart this life before she should attain the age of twenty-five years, or be married, then the said testator gave, devised, and bequeathed the said two one-fifth parts or shares last therein before respectively given, devised, and bequeathed, unto his said sons, John Wood, Henry Wood, and Thomas Philpot Wood, as tenants in common, and not as joint tenants, and equally to be divided between and amongst them, share and share alike, and their respective heirs, executors, administrators, and assigns.

The will then contained a proviso, by which the testator declared that it should be lawful for his said sons John Wood and Henry Wood, and the survivor of them, and the heirs and assigns of such survivor, at any time or times during the lifetime or widowhood of his said wife Ann Wood, or at any time afterwards during the continuance of the trusts thereby reposed in them, with the consent and approbation in writing of his said wife Ann Wood during her lifetime or widowhood, and afterwards, with the consent

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and approbation in writing of the person or persons for the time being in the possession of or entitled to the receipt of the rents and profits of the premises proposed to be sold, under his, her, or their hand or hands, or of their or his own authority, if such person or persons should be in his, her, or their minority, to sell, dispose of, and convey all or any of the messuages, lands, tenements, hereditaments, and real estates thereinbefore devised, or such parts or part of all or any of the said messuages, lands, tenements, hereditaments, and real estate as should be subject to such continuing trusts, and the fee simple and \*inheritance thereof, to any person or persons [\*465] whomsoever, for such price or prices as should be deemed reasonable; and upon payment of the purchase money to give proper receipts for the same, which should be discharges to the several purchasers, who were not to be answerable for any loss or misapplication; and the testator declared his will to be that the money arising from such sales should be subject to the same trusts as were before declared of and concerning the residue of his personal estate, or such parts or part thereof, as to which the trusts before declared should be continuing at the time of such sales. And he thereby appointed his wife Ann Wood, and his sons John Wood and Henry Wood, the executrix and executors of his will.

The testator died in the year 1820, leaving his wife Ann Wood, and the five children named in his will, surviving him. His son Thomas Philpot, and his daughter Eliza, subsequently attained the age of twenty-one, and his son William married and had issue.

In the month of June, 1825, in contemplation of a marriage, which was shortly afterwards solemnized between Eliza Wood and Bernard Maynard Lucas, a settlement was executed, which bore date the 6th of June, 1825, and was made between Ann Wood the widow of the first part, Eliza Wood of the second part, John Wood and Henry Wood of the third part, Bernard Maynard Lucas of the fourth part, and John Wood, Thomas Philpot Wood, and Thomas Burton Lucas of the fifth part. This settlement, after reciting the testator's will, and that his debts and funeral and testamentary expenses and legacies had been paid and satisfied, and the clear residue of his personal estate realized and placed out as therein mentioned, but that no part of his real estate had been sold or disposed of, though it was expected and intended \*that the same should be sold and disposed of at such time [\*466] or times as should be deemed most convenient and proper, under and by virtue of the power contained in the said will; and further reciting (as was the fact,) that Eliza Wood was then of the age of twenty-three years or thereabouts, she the said Eliza Wood, with the privity, consent, and approbation of the said several persons parties thereto of the first, third, and fourth parts, bargained, sold, assigned, transferred, and set over unto the said John Wood, Thomas Philpot Wood, and Thomas Burton Lucas, their executors, administrators, and assigns, all that and those the part or share and parts or shares of her the said Eliza Wood in possession, reversion, remainder, ex-

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pectancy, and contingency, or otherwise howsoever, of and in all and singular the moneys which should arise or be produced, by or from the sale of all the messuages, lands, tenements, hereditaments, and real estates whatsoever, late of the said testator deceased, and of and in the stocks, funds, and securities, in or upon which the same moneys should be invested, and also of and in all and singular the moneys, stocks, funds, and securities which did or should constitute the clear residue of his personal estate, and of and in the dividends, interest, and income thereof respectively; to hold, receive, take, and enjoy the same, (subject and without prejudice, as in the said will and thereinbefore was mentioned,) unto and by the said John Wood, Thomas Philpot Wood and Thomas Burton Lucas, their executors, administrators, and assigns, thenceforth, as their own moneys and effects, nevertheless upon certain trusts thereafter expressed in favor of Bernard Maynard Lucas, and Eliza his intended wife, and their issue: and the trustees were authorized to receive the moneys thereby assigned, and to give effectual discharges for the same, without any obligation on the part of the persons paying the same to

[\*467] see to the application thereof; and \*it was declared that, until sale of the testator's real estate, the part or share, parts or shares, of Eliza Wood in the rents and profits thereof should (subject nevertheless, and without prejudice as thereinbefore mentioned or referred to) be held and applied upon the same or the like trusts as were thereinbefore declared concerning the interest and income of the moneys thereby assigned or intended so to be.

Henry Wood died in the year 1826, having by his will devised and bequeathed his share of the estate to his mother Ann Wood in fee; and she devised and bequeathed it to her sons, John Wood and Thomas Philpot Wood in fee, and died in the following year. In the year 1831, William Wood died, leaving three infant children. There was at present no issue of the marriage of Mr. and Mrs. Lucas.

In the month of January, 1835, John Wood, as surviving trustee and executor named in the will, entered into a contract for the sale of the real estates; and, objections having been subsequently taken to the title, the present bill was filed by John Wood the vendor, together with Mr. and Mrs. Lucas, and Thomas Philpot Wood and Thomas Burton Lucas, as co-trustees with John Wood of the marriage settlement, against the purchaser, to compel a specific performance of the contract.

The Master of the Rolls, being of opinion that the vendor could not make a good title to the two-fifths of the estate limited by the will to William Wood and Mrs. Lucas, dismissed the bill with costs; and the plaintiffs thereupon appealed.

[\*468] Mr. *Wigram* and Mr. *F. Forster*, for the appeal.—\*John Wood and Thomas Philpot Wood are now seised in fee simple of three-fifths of the estate to their own use; and are ready to join in the conveyance. The question therefore is confined to the two shares devised in trust for the testator's children William and Eliza, the only shares as to which it is neces-

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sary to have recourse to the power of sale contained in the will, in order to make a good title to the purchaser. There is no pretence for holding that this power of sale was void *ab initio*, on the ground of its being or tending to a perpetuity; for all the authorities concur in showing that a power of sale is valid wherever, as in the present instance, it is to be exercised within the period of a life or lives in being, and twenty-one years thereafter, or during the continuance of successive estates tail, with which it is co-extensive, and with which it may, of course, be destroyed; *Ware v. Polhill*,<sup>(a)</sup> *Boyce v. Hanning*,<sup>(b)</sup> *Biddle v. Perkins*,<sup>(c)</sup> *Powis v. Capron*,<sup>(d)</sup> *Waring v. Coventry*.<sup>(e)</sup> Here the power may appear, in terms, to extend to and override the whole estate, as well the shares which are devised to John, Henry, and Thomas Philpot in fee, as the shares which are limited in trust for the benefit of William and Eliza. But, in order to support the power and give it operation, the court will, if necessary, so model and distribute it as to make it apply to those shares only of which otherwise no sale could be effected, according to the principle adopted by Sir John Leach in *Trower v. Knightley*.<sup>(g)</sup> The Master of the Rolls was not called upon to pronounce any decision upon these points; for his lordship's judgment proceeded on the ground that, in the events which had taken place, and in "con- [\*469] sequence of the death of William Wood and the marriage settlement of Mrs. Lucas, the trusts as to their respective shares had determined, or were to be considered, in equity at least, as no longer continuing trusts; and that the time for exercising the power was therefore gone by likewise. The special provisions of the will, however, no less than its general scope and context, lead, it is confidently submitted, to a directly opposite conclusion; and certainly, for many purposes, the trusts as to both shares, but especially as to William's fifth, are still subsisting and in force. His lordship's construction, indeed, while it defeats the power, at the same time frustrates the testator's object, and renders the trusts, in a great measure, nugatory, by disabling the trustees from effectually and advantageously dealing with the property for the benefit of the *cestuis que trust*. It is, therefore, not to be adopted without a paramount necessity; and no such necessity exists here. On the contrary, every argument to be drawn from the sense of the expressions used, from the spirit and purpose of the instrument, and from the authority of decided cases, is favorable to the continuance and validity of the power. The provisions of Mrs. Lucas's marriage settlement do not attempt or affect to modify or disturb the power, but leave it perfectly untouched: in fact, they proceed upon the supposition that the power will continue in force and be exercised by a sale of the estate, for they deal throughout, not with the estate itself, but with the expected proceeds of the intended sale under the power; and further, it may be contended that the settlement itself gives a power of sale by implication.

(a) 11 Ves. 257.

(b) 2 Crom. & J. 334.

(c) 4 Sim. 135.

(d) 4 Sim. 138.

(e) 2 Mylne & Keen, 249.

(g) 6 Mad. 134.



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Mr. *Tinney*, Mr. *Lloyd*, and Mr. *Braithwaite*, contra.—The purchaser is willing and anxious to complete his contract, provided the court is [\*470] satisfied that a good title \*can be made: and the suit, which is quite amicable, was instituted on the advice of an eminent conveyancer, under the impression that any possible defect in the title might be cured by a decree.

[THE LORD CHANCELLOR observed that this was a misapprehension into which persons not familiar with the rules and principles of pleading in courts of equity not unfrequently fell, and which he hoped would not occur again. It was idle to suppose that defects in the title to an estate could be cured by any decree made in the absence of those who had good grounds for impeaching it. If this purchaser chose to ask for the judgment of the court upon the title, by refusing to complete his contract without a suit, the court could only deal with the question upon the same principles, and would require the title to be established with the same strictness as if the cause had arisen between hostile parties. The bill, too, was singular, and inconvenient in its form; and it did not very clearly appear upon what principle Mr. and Mrs. Lucas and the trustees of their settlement, who were no parties to the contract, had been joined in it as co-plaintiffs with the vendor.](a)

*Argument resumed.* This being a suit for specific performance against a purchaser, the defendant has a right to a clear marketable title. Now, after what has already taken place, can it be said with truth that, as to the two-fifths of William and Eliza, the title is clear? The view taken by the Master of the Rolls in his judgment relieved his lordship from the necessity of considering the validity of the power of sale; but his lordship intimated serious doubts whether the power might not be void *ab origine*, [\*471] either as tending to a perpetuity, or \*as being incapable of being modelled and distributed, so as to apply to the two shares in question. None of the authorities referred to in support of this power come up to the present case; and it is open to the objections which Lord Eldon pointed out in *Ware v. Polhill*.(b) The power is, apparently, a general power, to be exercised over the entirety of the estate, and not subject to any limit or restriction; it is vested in persons who, as to two-fifths of the property devised, were themselves owners of the fee; and it is in terms to subsist “during the continuance of the trusts thereby reposed,” as well during the lifetime of the widow, as afterwards during the minority of the persons beneficially entitled. If by that is meant, “so long as the trustees shall hold the legal estate,” it would amount to a clear perpetuity. But, even if that were not so, still, if one of William’s children were to die under age, leaving issue, the trusts might continue, and with them the power, for an indefinite period, and during a series of minorities. The case would thus fall directly within the principle of *Ware v. Polhill*; and, if the power is bad to the extent to which it is given, the court is not at liberty to moderate or

(a) See *Tasker v. Small*, 3 Mylne & Craig, 63: see p. 68; [71, n. 1.] (b) 11 Ves. 257.



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 1838.—Wood v. White.
 

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sever it, in order to support its validity as to a part. *Trower v. Knightley*(a) was a very peculiar case; but it does not appear that in that case there was any direction that one moiety should be conveyed to the wife and children. In point of fact, there is here no authority to sell beyond the life estate of the widow. The meaning of the testator probably was that so long as his widow lived, the power should operate over the whole, and after her decease, upon the particular shares which might require it; but although that may have been his intention, he has not so expressed \*himself, [\*472] but has left the court to collect, or rather to conjecture, from the context, how long the power was to be kept on foot, and to what extent it was to be exercised. The observations of Mr. Baron Bayley in *Boyce v. Han-ning* are extremely apposite on this point.

If the power was not bad in its inception, on the ground of perpetuity, the trusts, during the continuance of which only it was to be exercised, have since determined, and with them the power has ceased. The conveyance of William's share to his children was to be made "from and immediately after his decease" at which time the share was to "be conveyed and assigned to them." The power had reference not to the possible minority of the children, but only to the life estate of William and his mother; and it was not competent to the trustees to keep their power alive by delaying to convey the estate beyond the period which the testator had himself prescribed for that purpose.

With respect to the share of Eliza, all that remained for the trustees to do upon her marriage was to convey her share of the property, upon such limitations for the benefit of her and her issue as should be suggested by them, with the concurrence of her mother. They had to denude themselves of their trust and settle the estate upon a new series of limitations; and a new power of sale inserted in the settlement then made would have been good. Instead of creating a new power, however, the parties proceeded on the supposition that a sale could still be effected under the old proviso contained in the will—a supposition founded on the erroneous idea that the subject they had to dispose of was not land but money. As to deriving a title from Mr. and Mrs. Lucas, the latter have not a fee simple in \*them to convey. In [\*473] the event of Eliza (Mrs. Lucas) marrying under twenty-five (as she did,) the trustees were to convey and settle her share of the estate for the benefit of her and her issue; and in case the whole of the estate should not be so settled, the trustees were to convey the remainder to Mrs. Lucas absolutely. But, in point of fact, the settlement comprises the whole of her share, Mr. *Wigram* in reply,

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1839: Jan. 17.—THE LORD CHANCELLOR:—This was a bill for specific performance by a vendor. Both parties being desirous, as it was stated, that the purchase should be completed, the bill was filed under an impression that

(a) 6 Mad. 134; and see 2 Sugd. on Powers, p. 509, 6th ed.

1839.—Wood v. White.

the title would be more secure after a decree for performance of the contract. If, however, there be any valid objection to the title, the question upon it will hereafter arise between parties who will not be bound by the proceedings in this cause; so that the object of the parties, particularly after the decree at the Rolls, will not be forwarded by any judgment I may pronounce.

I must look at this case without reference to the object of the parties, and decide it as between a vendor, seeking to enforce, and a purchaser adversely resisting, the performance of the contract, upon the ground of title.

The question upon the title is as to a power of sale, and depends upon the effect to be given to the will of John Wood, and a settlement upon the marriage of his daughter Eliza.

[\*474] \*John Wood, by his will, after giving a house to his wife for life, together with an annuity for life, charged upon all the rest of his real estate, as to the said house after her decease, and as to all other his real and personal estate, he devised and bequeathed the same, after payment of his debts and legacies, as follows:—One-fifth to his son John Wood, his heirs, executors, &c.; one-fifth to his son Henry Wood, his heirs, executors, &c.; one-fifth to his son Thomas Philpot Wood, his heirs, executors, &c.; one-fifth to his sons John Wood and Henry Wood, their heirs, executors, &c., upon trust to pay the rents and income to his son William Wood for his life; and from and immediately after his decease, to convey and assign the said one-fifth to all the children of William, and their heirs, executors, and administrators, as tenants in common: “provided also, that in case any of them should die under twenty-one, without issue, then the part or share of him or her so dying should go and be conveyed and assigned unto the survivors or others of such children, as tenants in common, and their respective heirs, executors,” &c.; and if they should all die under twenty-one, and without issue, or in case William should have no issue, the testator gave, devised, and bequeathed the said one-fifth unto his sons John, Henry, Thomas, and his daughter Eliza, for the like estates, and the share of his daughter Eliza to be upon the like trusts and subject to the like provisos and declarations, as were given and declared of the original one-fifths of his said sons and daughter respectively. And he devised and bequeathed the remaining one-fifth unto his said sons John and Henry, their heirs, executors, administrators, and assigns, upon trust to apply the income for the maintenance and education of his daughter Eliza till twenty-five, or marriage; and, upon his said daughter attaining twenty-five, if unmar-

[\*475] ried, to convey and assign \*the said one-fifth to her, her heirs, executors, and administrators, for ever. But if she should marry before attaining that age, then immediately after such marriage, with the advice and concurrence of his wife, to convey, assign, and settle all or such reasonable part or parts of the said last-mentioned one-fifth, as they or he, with such advice and concurrence as aforesaid, should deem proper and expedient, to such uses, upon such trusts, and to and for such intents and purposes, for

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 1839 — Wood v. White.
 

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the benefit of his said daughter and her issue, and with such reasonable estates and interests in favor of any person or persons with whom she might intermarry, as they or he, with such advice and concurrence as aforesaid, should deem proper and expedient; and should convey and assign the residue of such one-fifth, if any, unto his said daughter, her heirs, executors, administrators, or assigns, or unto such person or persons, and for such estates and interests as she or they should direct or appoint. And it was thereby provided that it should be lawful for his said sons John and Henry, and the survivor of them, and the heirs and assigns of such survivor, at any time or times during the lifetime or widowhood of his wife, or at any time afterwards during the continuance of the trusts thereby reposed in them, with the consent and approbation in writing of his said wife during her lifetime or widowhood, and afterwards with the consent and approbation in writing of the person or persons for the time being in the possession of, or entitled to, the receipt of the rents and profits of the premises proposed to be sold, under his or their hand or hands, or of their or his own authority if such person or persons should be in his, her, or their minority, to sell, dispose of, and convey all or any of the messuages, tenements, hereditaments, and real estate before devised, or such parts or part of all or any of the said "mes- [\*476] snages, lands, tenements, hereditaments, and real estate as should be subject to such continuing trusts, and the fee simple and inheritance thereof, &c.—with the usual powers—as to which no question arises. And it was declared that the money arising by such sale or sales should be subject to the same trusts as were before declared of and concerning the residue of his personal estate, or such parts or part thereof as to which the trusts before declared should be continuing at the time of such sale or sales.

The testator died in the year 1820; his widow in the year 1827; William, the son, in 1831, leaving children; Henry, the son, who was one of the trustees, died in 1826; Eliza attained the age of twenty-one in the year 1823, and married in the year 1825; and, upon her marriage, a settlement, dated the 6th of June, 1825, was executed, which constitutes an important part of the case. In the year 1835, John, the surviving trustee, agreed to sell the whole of the property to the defendant Thomas White.

No question is made as to the title of the three-fifths devised to the three sons, John, Henry, and Thomas. As to the other two-fifths, devised to William and his children, and to Eliza, the only question made is, whether any power now exists to sell these shares, William being dead, and his children infants, and Eliza having married and a settlement been made, to which it will be necessary particularly to advert; although, in the view which the Master of the Rolls took of the case, it was not necessary for him to give any opinion as to its effect, he being of opinion that no title could be made to William's share, and consequently that the bill must be dismissed.

\*This opinion proceeded upon the ground that by the death of [\*477] William, although his children are still infants, and by the marriage

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of Eliza, the trusts of the will as to those two-fifths had determined; and that the power to sell, which was by the will to be effective only during the continuance of the trusts thereby reposed in the trustees, had ceased, and consequently that no title could be made to those two-fifths.

So far as William's share is concerned, the whole turns upon that question. I will examine it before I advert to the case as to Eliza's one-fifth.

The Master of the Rolls thought that upon the death of William, although his children were infants, a conveyance of his one-fifth ought to have been made by the trustees, and that the interests of those who were to take, in the event of the deaths of any or all such children, might and ought to have been provided for and secured by limitations in such conveyance. I say "ought to have been," because, though it could be shown that this might have been effected by a conveyance of the legal estate, that would not prove that the trusts ought therefore to be considered as determined, if it should appear that the testator's intention, as manifested by his will, was that those objects should be effected by a continuance of the trust. The will certainly directs that, from and immediately after the decease of William, the trustees should convey and assign to his children; but if such conveyance and assignment could not be made to such children, being under twenty-one years of age, without defeating the testator's declared intention and directions, in the event of any or all of them dying under that age, such direction to convey [\*478] and assign must be confined to the case of such children, being at such time of the age of twenty-one, at which time they would become absolutely entitled.

What, then, were the intentions and directions of the testator in the event of all or any of the children dying under twenty-one? The first provision is, that in the event of any one of the children dying under twenty-one, the part or share of him or her so dying should then be conveyed and assigned to the survivors. That must mean, to be conveyed and assigned by the trustees to whom he had devised and bequeathed that one-fifth of his real and personal estate; and as such decease of one of his children might take place after the death of William, the trustees must necessarily retain the estate, and the trust must continue so long as it might be necessary to make such conveyance or assignment—that is, until the children attained the age of twenty-one.

The next provision is still stronger. In the event of all the children of William dying under twenty-one, his share was to go to the testator's children John, Henry, Thomas, and Eliza, the share of Eliza to be upon the like trusts, and subject to the like provisions and declarations as were given and declared of and concerning her original one-fifth; and that original share was devised and bequeathed to John and Henry, upon trust to pay to Eliza, till twenty-five, or her marriage, the income; and upon her marriage, under twenty-five, to convey, assign, and settle the same, or a reasonable part thereof, as they, with the advice of the mother, should think proper, for the benefit

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of Eliza, her issue, and her husband ; and to convey and assign the residue to her, or as she should appoint ; and, by her settlement, not only [\*479] her original one-fifth in possession, but all her parts or shares in reversion, remainder, expectancy, and contingency, or otherwise, were settled. Now, whether this trust would arise for the benefit of Eliza and her issue must be uncertain until the children of William die under twenty-one, or attain that age ; and if they should all die under twenty-one, this trust would be to be executed for Eliza and her issue. To preserve to the trustees the power of so executing this trust, it was necessary for them to retain the estate, and that the trusts under the will should continue so long as any of William's children should be under twenty-one.

It is also to be observed that the trust was a joint trust of real and personal estate ; and whether the objects could or could not be attained by a settlement of the real estate, it is obvious that the only means of securing the ulterior object of the disposition of the personal estate was by a continuance of the trust ; and there is no reason to suppose that the testator intended that the trusts of the real and of the personal estate should determine at different periods.

I am, therefore, of opinion that the trusts of William's one-fifth were continuing and subsisting at the date of the contract, and are so still ; and that, as to this one-fifth, the power of sale is still subsisting.

With respect to Eliza's one-fifth, the case is very different. Upon her marriage under twenty-five the trustees were to settle and convey it upon trusts and for purposes not prescribed by the testator, for the benefit of herself, her issue, and husband, or absolutely, as she should appoint. And I agree with the Master of the Rolls in this, that the trusts under the will would thereupon determine ; and if so, the power of sale under the will [\*480] would, as to this one-fifth, have ceased from that time ; because it was not necessary, as was the ground of Sir John Leach's judgment in *Trower v. Knightley*,<sup>(a)</sup> that the power as to one share should continue, in order to preserve it for the benefit of other shares, the direction being that it should continue as to such parts, if any, of the premises as should be subject to continuing trusts. If, therefore, there be now any power or trust to sell the one-fifth of Eliza, it must be found elsewhere, and not in the will of the testator.

The settlement executed upon Eliza's marriage recited the will of the testator, and that his real estate had not been sold, though it was expected and intended that the same should be sold and disposed of at such time or times as should be deemed most convenient and proper, under and by virtue of the power contained in the said will ; and then Eliza Wood assigned and transferred to John Wood and two other trustees all her part and share of and in all and singular the moneys which should arise or be produced by or from

(a) 6 Mad. 134.



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1839.—Wood v. White.

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the sale of the real estate of the testator, and all her right, title, and interest therein, upon trust for herself, her husband, and children, if any; and the trustees were authorized to obtain payment of such moneys, and to give discharges for the same, without any obligation on the parties paying to see to the application thereof. And it was declared that until sale of the real estate, the part or share of Eliza, of and in the rents and profits thereof, should be held and applied upon the same or the like trusts as were before declared of the dividends and income of the moneys, stocks, funds, and securities thereby assigned or intended so to be.

[\*481] \*At the date of this settlement John and Henry Wood held the legal estate in Eliza's one-fifth; and she, with the concurrence of John and Henry Wood and of her mother, had the absolute dominion over the property. It is true that the mother being then alive, the intended sale referred to in the settlement might have been, and obviously was intended to take place, under the power in the will; but the settlement assumes that the land was to be converted into money, and that by John and Henry Wood, who held the legal estate; and the property settled is the one-fifth of the proceeds of the sale.

The question is then, whether this settlement does not authorize John Wood, who has survived his brother Henry, to sell this one-fifth. It does not, in terms, impose upon them the duty of selling; but it recites an existing intention that they should sell, and then treats them as the trustees of the legal estate of the property to be sold, and makes John one of the trustees of the money to arise from such sale. Here is a clear intention for a conversion of the realty into money, and a dealing with and settlement of money which could only arise from such conversion; and to this the trustees who alone could make the conversion, and the *cestui que trust*, who alone could direct it, are parties. They had a right to direct a sale, and to create a power or a trust for that purpose; and as a sale is necessary to give effect to the provisions of the settlement, and the declared intention of the parties to it, I think that a sale is thereby authorized, though not in terms directed.

The circumstances of this case are so peculiar that there is no probability of any decision having taken place directly in point; but there are rules established strongly analogous, by which a power or trust to sell has

[\*482] been held to be created by implication. If a \*testator directs that his lands shall be sold, and the proceeds be to be distributed by his executors, they have the power to sell, though no such power is in terms given to them. So, if a testator merely charges his lands with the payment of his debts, this is so equivalent to a trust for that purpose, that a purchaser is not bound to see to the application of the purchase money.[1] In both cases the power and trust are implied for the purpose of carrying into effect the declared intention as to the purchase money.

[1] *Eland v. Eland*, ante, 420.



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1839. —Wood v. White.

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Another way of considering this question is to inquire whether any one will be able hereafter to dispute the title of the purchaser, that is, to claim the land itself. The purchaser will have the legal estate from the trustee. The daughter Eliza and her husband can never dispute the purchaser's title, they having been parties to the settlement, which, assuming that the trustees were to sell, dealt only with the purchase money ; but if this be so, the children of Eliza must be equally bound, as their title is only under their mother, who, with the concurrence of her mother and the trustees, had the absolute dominion over the property.

I am, therefore, of opinion that a good title can be made to Eliza's share also.

I must not pass over an objection raised as to the whole of the power under the will, namely, that it was too remote, and tended to a perpetuity. Being of opinion that the trust as to William's share would determine upon his children attaining twenty-one, and that the trusts as to Eliza's share would determine upon her attaining twenty-five, or marrying, this objection may be considered as disposed of ; but if it were otherwise, the sale in question is within the permitted period, and \*there would not, I think, [\*483] be much doubt of its validity until the expiration of that period.[2]

Having now disposed of the question of title, I cannot dispose of the case without observing upon the frame of the suit.

The contract is, in the usual form, between John Wood, the vendor, and Thomas White, the purchaser ; and they alone ought to have been parties to the suit ; instead of which, the trustees of Mrs. Lucas's settlement, and she and her husband, are made parties co-plaintiffs with the vendor John Wood. If their concurrence had been necessary to give security to the purchaser, as is stated to have been advised by the conveyancer consulted, it was for John Wood to bring them forward to assist in giving effect to his contract ; but as plaintiffs they have no title to sue. If the infant children of William had been made co-plaintiffs, or if there had been children of Mr. and Mrs. Lucas, and they had been made co-plaintiffs, I should have refused to make any decree in a cause so constituted, because I should have supposed that the object was to attempt to bind the infants in a suit by the proceedings of which they ought not to be bound ; but as all the plaintiffs are adults, and the objection has not been taken by the defendant, I do not think it necessary to do more than to observe upon the frame of the suit, that it may not be supposed, by my making a decree in it, to have received any sanction from me.[3]

There must be a decree for a specific performance, but without costs.

[2] *Wallis v. Freestone*, 10 Sim. 225 ; 2 Keen, 671, n. 1.

[3] In general, none but the parties to the contract are necessary parties to a bill for specific performance. *Robertson v. The Great Western Railway Company*, 10 Sim. 314. Where two houses held under one lease were sold in separate lots, and it was stipulated by the conditions of sale, that the purchasers should be parties to each other's assignment ; and on a bill for a specific per-

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 1839.—In re Markby.
 

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[\*484]

\*IN RE MARKBY, a Lunatic.

1839: August 10.

The apportionment act, 4 & 5 W. 4, c. 22, does not apply to rents payable by tenants from year to year, which have not been reserved by an instrument in writing.

THE lunatic died on the 28th of June, 1838, and, on his death, the present petitioner, who was the committee of his person and estate, obtained letters of administration of his personal estate.

Under an order, subsequently made, for taking the committee's accounts of the estate, the master, among other things, found that, at the time of the lunatic's death, the whole of his real estates therein mentioned, and of which he was seised in fee simple, were let to tenants from year to year, without any leases, agreements, or other instruments in writing between such tenants and the lunatic, or between such tenants, and the committee of the estate; and that the rents thereof, respectively, became due and payable at Lady day and Michaelmas day in each year; and that the same had been, respectively, received by the petitioner up to Lady day, 1838; but that the petitioner had not received any rents, in respect thereof, subsequently thereto; and that after the death of the lunatic, the lunatic's heir at law entered into the possession of the estates, and contended that the rents which accrued due during the following half year belonged exclusively to himself as heir, and were not apportionable between him and the personal representative.

The question raised by this petition was, whether the personal representative was entitled, under the late apportionment act, 4 & 5 W. 4, c. 22, to receive back from the heir at law a rateable proportion of the half  
 [\*485] year's rents which accrued due at Michaelmas, 1838, in \*respect of the period which elapsed between Lady day in that year and the 28th day of the following June, the day of the lunatic's death.

Mr. *Sidebottom*, for the personal representative.—The case comes within the equity and spirit of the statute; and, where the language is equivocal, that must decide the question. The demise here has been by letting the estate to tenants from year to year, on behalf of the owner in fee; and the case falls distinctly within the very first words in the second section of the statute. The rent of which apportionment is sought is "a rent-service reserved on a lease by a tenant in fee," words which describe a parol demise as correctly as a lease in writing. The doubt has been created by supposing that the subsequent part of the sentence, which speaks of payments made

formance against the purchaser of lot 1, it was objected that the purchaser of lot 2 was not made a party, Lord Langdale, M. R. said: "If there is to be a specific performance of the contract the purchaser of lot 2, will be bound to concur in the assignment, but is it necessary that he should be a party between the vendor and the purchaser of lot 1? I think not; besides the bill alleges that he is ready to concur. Although it might by possibility, become necessary hereafter to compel him to join in the assignment, still I see no reason for making him a party to a suit until that necessity arises." *Paterson v. Long*, 5 Beav. 186.

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1839.—In re Markby.

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payable under any instrument, requires that the rents-service also should be payable under an instrument, whereas all that the act requires as to them is, that the leases should have been granted after the passing of the act. No satisfactory reason can be suggested why the section should be held to apply to rents reserved on yearly leases, granted by parol, as well as to leases in writing; and such rents are within the words, and still more within the equity, of the statute.

Mr. *Bethell*, for the heir.—At common law, this rent was not apportionable; and the question is, whether the common law right of the heir has been taken away by the statute. The second section (which alone has any application,) must in sound construction, be confined to demises made or evidenced by some written instrument. It is impossible to disconnect any of the several matters enumerated in the \*clause from [\*486] the general words which follow and which qualify all the payments before specified; viz., the words “made payable, or coming due at fixed periods under any instrument that shall be executed after the passing of this act.” This qualification overrides the whole, and is equally applicable to rents-service, as to other rents, to annuities, pensions, dividends, moduses, compositions, and “all other payments of every description.”

THE LORD CHANCELLOR :—I am clearly of opinion that the statute does not apply to this case. First, it enumerates the most worthy subject, namely, rents-service. that is rents reserved under leases: then it proceeds to give an enumeration of various other subjects; concluding with a general clause large enough to embrace every kind of payment coming due at fixed periods; and it requires that they should be under an instrument executed after the passing of the act. But there was no intention on the part of the legislature to make any distinction between the several matters which are the subject of the enactment, as to whether the payments should or should not be under an instrument in writing. Even in the case of the least worthy of the subject matters which the section enumerates, it was intended that the instrument creating or evidencing the payment should be in writing; and, *a fortiori*, that was so as to the most worthy; the only question being as to the time at which the instrument was to be executed.[1]

[1] For an important decision under the stat. 4 & 5 Will. 4, see *Browne v. Amyot*, 3 Hare, 173.

1839.—Collard v. Allison.

[\*487]

\*COLLARD v. ALLISON.

1839 : November 14, 15. 1840 : April 15, May 14.

Although a patent is of long standing, yet if, from the nature of the alleged invention, or the conflicting evidence as to its novelty, its validity appears to be doubtful, or if the evidence of exclusive possession is not satisfactory, the court will not grant an injunction until the title has been established at law.

After the patentee had obtained a verdict in an action brought to try the validity of the patent, the court refused to grant an injunction to restrain the infringement of the patent, on the ground that a rule *nisi* for a new trial had been obtained and was pending in the court of law, and that the legal title of the patentee was therefore still undecided.

THE bill was filed for an injunction to restrain the alleged infringement of a patent for an improvement in the manufacture of grand square pianofortes. The patent had been obtained twelve years before.

The plaintiffs moved, at the Rolls for an injunction, and filed a number of affidavits in support of the motion. The defendants, by their answer, and by affidavits filed in opposition to the motion, admitted that if the patent was valid, the acts of infringement charged by the bill had been committed by them ; but they denied the validity of the patent, and stated facts to show that the plaintiffs had not been in the exclusive and undisturbed enjoyment of the patent right as alleged in their bill.

The Master of the Rolls refused the motion, and directed the plaintiffs to bring an action in the Court of Queen's Bench, to try the validity of the patent ; at the same time putting the defendants upon the terms of accepting short notice of trial and keeping an account. The plaintiffs now renewed the motion, before the Lord Chancellor, by way of appeal.

Mr. *Anderdon*, for the plaintiffs.

Mr. *Wigram* and Mr. *T. J. Phillips*, for the defendants.

[\*488] \*THE LORD CHANCELLOR. [After stating generally the nature of the apparatus constituting the alleged improvement, which the specification claimed as the subject of the patent.]

It is not my intention to express any opinion upon the validity of the patent, namely, as to whether the peculiarity of construction here claimed constitutes such an improvement as would be the subject of a patent ; because I have always thought the decision of that question should devolve upon that jurisdiction in which questions of law are more properly decided. It is not my intention, therefore, to express any opinion on the point, further than to say this, that it is by no means so clear that that is a ground on which a patent could be maintained.

Independently of that circumstance, however, there is very contradictory evidence as to whether it is a novelty or not. Persons whose opinions must in their profession be held in great esteem, give conflicting testimony on this point. [His lordship stated the effect of the statements on this subject contained in the affidavits on each side, and proceeded :—] The effect of these contradictory statements, therefore, as the matter now stands, leaves consi-

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1839.—Collard v. Allison.

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derable doubt upon the question whether that which is now claimed is a novelty or not; and that circumstance would make it my duty to send the question to law, and prevent me from granting an injunction in the meantime.

But then it is said, there is possession of the patent, and that possession of a patent for a certain length of time gives such a title as the court will protect until a trial at law can be had. And, certainly, if I found that manufacturers of piano-fortes had acquiesced, and \*that there was [\*489] no doubt upon that point to which I have before referred, I should have adopted the course which Lord Eldon adopted,<sup>(a)</sup> and which I have followed, of protecting the right until the trial should have been had. For that purpose, however, I ought to have very satisfactory evidence of exclusive possession. Now, I find here that certain manufacturers state that they abstained from making piano-fortes in this manner out of respect for the plaintiffs, as having a patent; while other manufacturers again say that they have always made them in this manner. Which of these statements is true, I am not called upon to decide; but the discrepancy does throw sufficient doubt on the case to prevent my interfering by injunction.

The result is that this case, in my opinion, wants that evidence of exclusive possession upon which Lord Eldon acted in the case that has been referred to; and that there is so much doubt as to the novelty of what is claimed, and as to the validity of a patent for such a manufacture, that I do not feel that I ought to interfere. It is obvious, however, that the question should be immediately tried. The object will be, to have the pleadings at law so arranged, that it should be tried at the sittings after this term.

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1840: *April* 15.—The action was accordingly tried before Lord Denman, at the sittings after Hilary term, 1840, and a verdict found, for the plaintiffs, in favor of the patent. On the first day of the following term, the motion for the injunction was renewed; but it appearing, on affidavit, that a bill of exceptions had been \*tendered, and that the defendants also [\*490] intended to move for a new trial in the court of law, the Lord Chancellor directed the application to stand over until the result of these proceedings should be known. Shortly afterwards, Sir W. Follett obtained a rule nisi for a new trial. The motion for the injunction was then brought on again; but

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*May* 14.—THE LORD CHANCELLOR said, that under the circumstances in which the case now stood at law—a rule to show cause why a new trial should not be had, having been granted—he must consider the legal title of the parties as still undecided; and he therefore refused the application.[1]

<sup>(a)</sup> *Hill v. Thompson*, 3 Meriv. 622.

[1] *Bacon v. Jones*, ante, 433.

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 1839.—Hutchinson v. Freeman.
 

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## HUTCHINSON v. FREEMAN.

1839: July 10.

Persons, not parties to the suit, but intervening before the master and making out their claims as next of kin of an intestate, whose estate is administered in the suit, and afterwards appearing at the hearing on further directions, ought to stand on the same footing in regard to their costs of these proceedings, as other next of kin who have been made parties.

THIS was a suit for the administration of the estate and effects of an intestate. Several persons claiming to be some of the next of kin of the intestate, but who had not been made parties to the cause, went into the master's office under the decree, and having there succeeded in proving their pedigree and establishing their title, as such next of kin, they now appeared on the hearing for further directions, and asked for their costs. No supplemental bill had been filed, bringing them formally before the court as parties.

[\*491] \*The *Solicitor General* and Mr. *Bellamy*, for the plaintiffs.

Mr. *Wakefield* and Mr. *Smythe*, for next of kin who were defendants.

Sir *Charles Wetherell*, for the next of kin who were not parties.

*Waite v. Waite*(a) and *Bennett v. Wood*(b) were referred to.

THE LORD CHANCELLOR said, he would give to these next of kin the same costs as they would have had if the plaintiffs had proceeded regularly and made them parties to the suit; but they were not entitled to have the costs of their proceedings in the master's office, unless the other next of kin, who had been made parties, were also entitled to such costs.(c)

[\*492]

## \*SHUTTLEWORTH v. HOWARTH.

1840: November 4, 5.

Persons who, as members of a very numerous class, were interested in a residuary estate administered in a suit, but who were not parties to the suit, were allowed their costs of proceedings in the master's office to establish their claims, and of their subsequently intervening in the suit, and applying for such costs, in like manner as other members of the same class who had been made parties.

THE testator devised and bequeathed his residuary estate, both real and personal, to the trustees and executors in his will named, in trust, as to one moiety of the clear proceeds, to be distributed among the descendants, to the fifth generation inclusive, of his uncle and aunt John Kay and Mary Kay, the brother and sister of his late father, living at the time of his (the testator's) decease; and, as to the other moiety, to be distributed among the descendants, to the fifth generation inclusive, of his uncle and aunts, Thomas

(a) 6 Madd. 110.

(b) 7 Sim. 522; and see P. Wms. 27.

(c) See *Shuttleworth v. Howarth*, the next case. [S. C. Cr. & Ph. 228.]



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1840.—Shuttleworth v. Howarth.

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Kay, Ann Kay, and Catherine Kay, the brother and sisters of his mother, living at the time of his decease; such descendants to take, share and share alike, *per stirpes* and not *per capita*.

The bill was filed by two of the trustees and executors, against several persons who claimed to be descendants of the testator's uncles and aunts, answering the description of the residuary legatees; and also against his co-heirs at law. It alleged that the plaintiffs were unable to ascertain whether there were any others of such descendants in existence besides those who had been made defendants; and it prayed that the estate might be administered, and the trusts of the will performed under the direction of the court.

The cause was heard on the 14th of August, 1828, when a decree was made directing a variety of preliminary inquiries and accounts. By a separate report made in pursuance of that decree, the master found that of the persons who had gone in before him and \*established their title [\*493] as residuary legatees, answering the description in the will, and whose names and additions were set forth in a schedule annexed to the report, 332 were descendants, within the prescribed degrees, of the testator's paternal uncle and aunts; and 144 were like descendants of the testator's maternal uncle and aunts. Of these a comparatively small number only were parties to the suit.

At the hearing of the cause on further directions, before the Vice-Chancellor, Margaret Southam, in whose favor the master had reported, as a person who had made out her claim as one of the residuary legatees, but who had not been made a party to the suit, was allowed to appear and be heard by counsel, in the same manner as if she had been a party.

By the order then made, the master was, among other costs, directed to tax the costs of Margaret Southam's appearing on the hearing on further directions; "but, under the circumstances of the case, the court did not think fit to give to her, or to any of the other persons who had established their claims before the master as descendants of the testator's uncles and aunts, and not parties to the suit, any costs of establishing such claims." The order then went on to provide for the payment out of the fund in court, of the several costs thereby directed to be taxed.

Margaret Southam having died shortly afterwards, a petition of appeal against this part of the order was presented by certain other persons, who, like her, were not parties to the suit, but had established their title in the master's office, as descendants, or representatives of descendants, to the fifth generation of some or one of the testator's uncles or aunts. The petition prayed that \*the appellants' costs of making out, proving, and [\*494] establishing their respective claims before the master, as well as of the petition, might be taxed and paid to them out of the fund in court.

The appellants' counsel cited and relied upon the case of *Hutchinson v. Freeman*,<sup>(a)</sup> in which the Lord Chancellor laid down the principle, that per-

(a) Page 490, *supra*.

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1840.—Shuttleworth v. Howarth.

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sons who were members of a class, but who had not been made parties to a suit in which their claims were investigated and established under the decree, were entitled to their costs of the proceedings for that purpose, in like manner as other persons of the same class who had been brought regularly before the court as parties.

On the other hand it was urged, that the costs of the very numerous descendants of the testator's uncles and aunts would amount to a very large sum; and that it would be extremely dangerous to lay it down as a general rule, that wherever a numerous class of persons, whether creditors, next of kin, or residuary legatees, were interested, in that character, in property which was administered in court, they were to be entitled to the costs of making out their title before the master, at all events, and whether they were parties to the cause or not. The natural and necessary result of such a rule, in cases of this kind, would be, that the whole of the estate would be swallowed up in costs.

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Nov. 5.—THE LORD CHANCELLOR said, he had made inquiry as to the order in *Hutchinson v. Freeman*, and had learned that, from the terms of it, as drawn up, it did not distinctly appear what costs had been allowed to the \*next of kin, who were not parties. The principle he had [\*495] laid down in that case, however, was, that such next of kin should be allowed the same costs as if the plaintiffs had brought them regularly before the court as parties; and, consequently, that if they would, as parties, have been entitled to their costs of proceedings in the master's office for the purpose of making out their claim, and their costs of appearing on further directions, but not otherwise, they should also be allowed those costs on taxation. To that principle he was disposed to adhere; and it seemed to be directly applicable to the present case. These appellants constituted a very numerous class of claimants, who, in strictness, ought all to have been brought before the court as parties; but that would have created great delay and expense. Very properly, therefore, those having the conduct of the suit had declined to make them parties; [1] and the question now was, whether they were to be in a worse situation on that account. His lordship's opinion was, that they ought to be placed on exactly the same footing, as to costs, as if they had been regularly made parties. He at first had supposed that the costs of proceedings by parties to a suit, in establishing their title to a fund, as members of a class, before the master, were not costs in the cause; but on further inquiry he found that according to the practice, those costs were considered to be costs in the cause, and would, in the ordinary course, be allowed to such parties. The Vice-Chancellor's order ought, therefore, to be vari-

[1] *Walburn v. Ingilby*, 1 Myl. & K. 77; *Caldecott v. Caldecott*, Cr. & Ph. 183; *Wendell v. Van Rensselaer*, 1 Johns. Ch. Rep. 349; *Harvey v. Harvey*, 4 Beav. 215; *Hawkins v. Hawkins*, 1 Hare, 543.

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1840.—*Shuttleworth v. Howarth*.

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ed, and the order made in the same form as that made in *Hutchinson v Freeman*.

Mr. *Wigram*, Mr. *Stuart*, Mr. *Kenyon Parker*, Mr. *Geldart*, Mr. *Rogers*, and Mr. *Freeling*, were for different parties.

\*The order was, that the master should tax the petitioners and [\*496] all other persons, who, not being parties to the suit, had established their claims as descendants, or representatives of descendants, of the testator's uncles and aunts, and were certified to be such by the master's separate report, and respectively named in the schedule thereto, the costs incurred by them respectively in establishing their claims before the master; such costs to be taxed and allowed in like manner as if such persons had been parties to the suit, and also to tax the petitioners and the plaintiffs and defendants their costs of the application and consequential thereon, &c.[2]

[2] S. C. Cr. & Ph. 228.

# REPORTS OF CASES

ARGUED AND DETERMINED IN

## THE HIGH COURT OF CHANCERY.

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ST. JOHN'S COLLEGE, OXFORD, v. CARTER and Others.

1839: February 13.

If a party who together with others, has been restrained by injunction from doing a particular act, is afterwards present, aiding and abetting when that is done which the injunction has prohibited, he is guilty of a breach of the injunction.

THOMAS PRATT, one of the defendants in this cause had been committed by the Vice-Chancellor's order, for breach of an injunction which had been awarded in the cause, to restrain him and others from cutting wood in Bagley Wood, in the county of Berks.

The defendant Pratt moved, before the Lord Chancellor, that the Vice-Chancellor's order might be discharged, on the ground, that although he was present when a breach of the injunction was committed, he did not actually commit a breach of it himself.

Mr. *Wakefield* and Mr. *Randell*, in support of the defendant's motion.

Mr. *Knight Bruce* and Mr. *Bellamy*, *contra*.

[\*498] \*THE LORD CHANCELLOR said, that if it were proved that the defendant was present, aiding and abetting, when a breach of the injunction was committed, he must be considered as having been actually guilty of a breach of it himself. His lordship then proceeded to examine, at length, the statements made in the various affidavits before him, and said that the facts deposed to could leave room for no doubt whatever that the defendant was present, aiding and abetting, in the commission of an act which he had been prohibited by the injunction from doing. His lordship said, that he must abandon the principles applicable both to criminal and to civil law, if he did not visit the party practicing such conduct with all the consequences of a breach of the injunction; and that he should not be vindicating the jurisdiction of this court, if he did not refuse the motion.

Motion refused, with costs.

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1839.—Bickford v. Skewes.

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## BICKFORD v. SKEWES.

1839 : March 8.

When the court has interfered, in aid of a legal right, by granting an injunction, upon the terms of the plaintiff's bringing an action, it will deprive the plaintiff of the injunction, if he does not commence and proceed with his action with due promptness ; but it will not do this, if the defendant has been supine in the cause.

THE bill in this cause was filed to restrain the infringement of a patent right, by the manufacture and sale of an article called "the miner's safety fuze."

The letters patent were dated in the year 1831. The bill was filed on the 22d of August, 1837. The injunction was obtained, *ex parte* on the 30th of August, 1837. \*In February, 1838, the defendant [\*499] gave notice of a motion to dissolve the injunction, but did not move in pursuance of his notice, until the 10th of December, 1838, when an order was made, directing that his motion should stand over, with liberty for the plaintiffs to bring an action, they undertaking to bring an action, to try the right in dispute between the parties, within fourteen days from that time. The writ in such action was accordingly sued out of the Court of Queen's Bench on the 11th of December, but was not served till the 18th. The declaration was delivered on the 24th of January, 1839, and the defendant pleaded on the 14th of February. The pleas were, that the patent had not been infringed ; that the patentee was not the first inventor ; that the invention was not new ; and that the specification was insufficient. On the 22d of February, the plaintiffs replied in the action, and the defendant rejoined, and on the same day took out a summons to change the venue, upon which Mr. Justice Coleridge, on the 27th of February, made an order for changing the venue from the city of London to the county of Devon.

The spring assizes of the year 1839, for Devonshire having been fixed for the 18th of March, the defendant, on the 4th of that month, moved, before the Vice-Chancellor, that the plaintiffs might be ordered to proceed to trial at the approaching Devonshire assizes, and that, in default of their so doing, the injunction might stand dissolved. His honor having refused this application, it was now renewed before the Lord Chancellor.

An affidavit, in support of the motion, stated that the cases of both plaintiffs and defendant had been very fully got up, for the purpose of the motion to dissolve \*the injunction, and therefore, that little further time [\*500] was required to enable the plaintiffs to prepare for the trial, and that all the plaintiffs' witnesses, with the exception of three, resided either in Devon or in Cornwall. An affidavit, on the part of the plaintiffs, stated that until the venue was changed, the plaintiffs' solicitors had been preparing for trial at the sittings after Trinity term, 1839 ; and that all their proceedings in the action had been taken without delay, and within the time limited by

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 1839.—Bickford v. Skewes.
 

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the rules of court; but that it would be utterly impossible for them to be ready for trial in time for the approaching Devonshire assizes.

Mr. *Jacob*, Mr. *Richards*, and *Bethell*, in support of the motion.

Mr. *Wigram* and Mr. *Roupell*, *contra*.

THE LORD CHANCELLOR:—If the court declines to interfere, until the plaintiff shall have established his right at law, there is no danger of delay; for the plaintiff is obliged to proceed to trial at once; since the court will not interfere until he has done so. If, on the other hand, the court is of opinion that the defendant ought to be restrained, still putting the right in the way of trial, the court will then, I apprehend, exercise its right over the injunction according to the delay. If the patentee has been long in possession, the court will not look into the title, but will give credit to it, until displaced by a trial at law; and will put the plaintiff upon proceeding to trial, and exercise absolute control over the parties, according as they may or may not do that which the court has directed. I do not understand the Vice-Chancellor to have said that the court, having made that order, is to exercise no [\*501] further control over the plaintiff. The \*mode in which the court will deal with the plaintiff, if he does not proceed to trial, is to deprive him of that *prima facie* right which the injunction gives him.

Therefore, if there had been, in this case, promptness on the part of the defendant, I should have thought it very reasonable to compel the party to go to trial at these assizes. I find, however, that the alleged infringement took place in August, 1837, and that the bill was filed on the 22d of that month. The court is open, even during the vacation, for the purposes of *ex parte* injunctions; but I find that the whole of the remainder of the year 1837, and the whole of the following year, up to the 10th of December, passed away, during which the defendant made no application to the court. I find, therefore, the injunction acquiesced in, from August, 1837, to December, 1838. I find the plaintiffs in possession, against all the world, for six years, and the defendant subsequently acquiescing in the injunction for sixteen months. I cannot consider the plaintiffs as in default for the delay occasioned by default of the defendant. I find the venue changed on the 27th of February, and on the 1st of March, notice given before the Vice-Chancellor to compel the trial at the present assizes. That motion was not disposed of till last Monday; and now, on the 8th of March, I am to inquire whether I am to put the plaintiffs, after six years enjoyment before the bill filed, and after sixteen months acquiescence by the defendant in the injunction obtained in the cause, to go to trial in ten days. At the bar, that was probably thought not very reasonable, and I am asked again to change the venue, so that the trial may take place in another county twenty-one days hence; but, after what has taken place, I do not think it reasonable [\*502] to compel the \*plaintiffs to go to trial, even at twenty-one days dis-



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 1839.—Dubless v. Flint.
 

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tance, in a case which appears (particularly from the nature of the issues tendered at law,) to be one of so much importance.

Motion refused, with costs.[1]

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DUBLESS v. FLINT.

1839; March 9.

When a plaintiff claims to be entitled, in a particular character, to a fund in the hands of a trustee, and the trustee, by his answer, says he does not know whether the plaintiff fills that character or not, the plaintiff cannot have the fund brought into court in the suit.

THE plaintiff in this cause claimed to be entitled to a fund, admitted by the answer of the defendant Rest Flint to be in his hands. The plaintiff asserted his title as heir at law, and heir according to custom of gavelkind, of one Mary Bradden, deceased, of whose will Flint was a trustee. The defendant Flint, by his answer, said that he did not know, and could not set forth, as to his belief or otherwise, whether Mary Bradden left the plaintiff her sole heir at law, or her sole heir according to the custom of gavelkind, or whom she left her heir at law or customary heir.

The plaintiff having moved, before the Vice-Chancellor, that the fund, admitted by the defendant Flint's answer to be in his possession, might be brought into court in this cause, his honor refused the motion, with costs, upon the ground that the answer contained no admission of the plaintiff's title.

The plaintiff now renewed his motion before the Lord Chancellor.

\*Mr. Jacob and Mr. Lewis, in support of the motion, referred to [\*303] *Freeman v. Fairlie*.(a) and *Unsworth v. Woodcock*.(b)

Mr. W.gram and Mr. Turner, appeared for the defendant Flint; but

THE LORD CHANCELLOR (without hearing them) said that the case of *Freeman v. Fairlie* was a direct authority in support of the Vice-Chancellor's decision; and he refused the motion, with costs.[1]

(a) 3 Mer. 24.

(b) 3 Mad. 432.

[1] *Bacon v. Jones*, ante 433, and notes *ibid*.

[1] *Richardson v. The Bank of England*, ante 165, 177, n. 1. *Green v. Pledger*, 3 Haro, 165, 171. *Meyer v. Montrou*, 4 Beav. 343. *Edwards v. Jones*, 13 Sim. 637, 638.

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 1839.—Maund v. Allies.
 

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*Between* JOHN MAUND, Plaintiff; *and* EDWIN ALLIES, MARY ANN MAUND, JOHN FARQUHAR, AND JOHN HAIR, Defendants. *And between* JOHN MAUND, Plaintiff; *and* ANNE ALLIES AND HARVEY ALLIES, Defendants.

1839: March 27; April 12.

A plaintiff although appointed receiver in the cause, cannot, before decree, be ordered, as plaintiff to produce books or accounts in his possession, for the inspection of a defendant.

A party in possession of documents cannot, except by consent, be compelled to produce them for inspection elsewhere than before an officer of the court.

An order for a commission to examine witnesses, returnable upon a day subsequent to that to which publication stands enlarged, with liberty to apply to the master to enlarge publication, is irregular.

THIS suit was instituted for the purpose of having certain partnership accounts taken. Under an order in the cause, the plaintiff, who was [\*504] the managing \*partner, was appointed the receiver and manager of the partnership business; and he subsequently brought into the master's office his first account as such receiver. He was the owner of the freehold of the premises upon which the business was carried on.

On the 20th of November, 1838, the Vice-Chancellor made an order, upon the motion of the defendants Anne Allies and Harvey Allies, "that the plaintiff John Maund do permit Mr. John Moxham, of the city of Bristol, accountant, to compare and inspect, at the expense of the defendants, Anne Allies and Harvey Allies, the receiver's first account, left in the master's office, with the partnership books and accounts, at the counting-house of the said partnership at Pontypool, in the county of Monmouth, at all seasonable times, upon giving reasonable notice thereof to the plaintiff."

On the 11th of February, 1839, the Vice-Chancellor made another order, upon the motion of the same defendants, by which it was ordered that the plaintiff should allow the clerk or assistant of Mr. John Moxham to be present and assist him in such comparison and inspection.

The cause had not been heard.

The plaintiff now moved, before the Lord Chancellor, that both these orders might be discharged.

Mr. Wakefield and Mr. Rogers, in support of the motion, contended that the first order was, in fact, an adverse order against Mr. Maund as plaintiff, and not as receiver; and they said that it was served on his clerk [\*505] in court as such; that it was an attempt to \*graft, on the common order for a receiver to pass his accounts, a direction for the production of documents, which was never included in such an order, when properly drawn up; and that the real object of that direction, in the present instance, was to compel the plaintiff to produce partnership books, which he could not otherwise be compelled to produce.

Mr. Wigram, and Mr. Piggott, *contra*.—The question is, whether a receiver passing his accounts in the master's office is not bound to produce his

1839.—*Maund v. Allies*.

original accounts ; for the books sought to be produced are the books kept by him subsequently to his appointment as receiver.

**THE LORD CHANCELLOR :—**Whatever is necessary for the purpose of taking the receiver's accounts, the master has the power to call for without order : and no order would be necessary, unless it was intended to make an order against the receiver as plaintiff ; and the order would be equally wrong if made for that purpose. I understand it does not appear on affidavit that the receiver's account is taken from the partnership accounts. The accounts may be the same ; but it would have been the more regular course that there should have been such a statement. The plaintiff might then have been ordered to produce, as receiver, any books in which he had entered any accounts of his receipts or payments as receiver.

I would suggest that the order should be varied, by giving liberty to compare the receiver's accounts with any accounts contained in any books relating to the partnership. I am now considering the plaintiff as 'receiver, and excluding him from the character of partner. [\*506]

**Mr. Wakefield, in reply.**—I do not object to an order for the master to direct such an inspection of the accounts as your lordship suggests ; but I object to an inspection on the premises. The court has no jurisdiction to direct, even against a receiver, inspection at his private house. If the common order, appointing a receiver, does not give the master sufficient powers, I have no objection to his having additional powers ; but an order for inspection of documents at the place at which they happen to be is never made without the consent of the party in whose custody they are. The only place at which the court can order the production of documents is the master's office, or with the party's clerk in court.

There is no allegation in the affidavits that the partnership books contain a single item with respect to the receivership. The master will not pass the receiver's accounts until he shall have duly accounted for all that he has received.

**THE LORD CHANCELLOR :—**I think the parties have miscarried with respect to the character in which they have treated the plaintiff. As plaintiff, I consider it perfectly clear that he is not subject to be called upon, by an adverse application, to produce documents in his possession.[1] It is very dif-

[1] The defendant's course is to file a cross-bill. *Brown v. Newall*, 2 Myl. & Cr. 573. *The Commercial Bank of Buffalo v. The Bank of the State of New York*, 4 Hill, 516. 1 Beav. 178, n. 1. 2 Sim. & Sta. 244, n. 3. Although the Master of the Rolls would not order the plaintiff to produce documents, he yet gave the defendant time to answer, from the time of the plaintiff's depositing the document with his clerk in court : thus substantially evading the general rule ; for until the plaintiff complied with the condition, he had no means of expediting his cause. *Shepherd v. Morris*, 1 Beav. 175. The same course was again pursued by the same judge in *Taylor v. Heming*, 4 Beav. 235, the material part of the judgment in which case will be found in 1 Beav. 180, n. 1. Lord Langdale has himself admitted that " the court has certainly shown some astuteness in making such orders ; a case (*Shepherd v. Morris*,) of that description was lately before me." *Wedderburn v. Wedderburn*, 2 Beav. 212.

1839.—*Maund v. Allies*.

ferent after a decree which orders it. In the present instance I consider the plaintiff merely as receiver of property common to both parties; and I apprehend it to be quite clear that, having some documents in his possession relative to his accounts, it is right to make an order to compel him to produce them to the other party. If he has kept accounts at all, they must include some items relating to the partnership affairs. Clearly the court has, and I apprehend the master ought to have, power to compel the plaintiff to produce all accounts kept by him connected with the partnership. There is considerable difficulty in not ordering inspection at the premises, because any other place will be inconvenient: but at the same time I feel that a party in possession of documents, as receiver, at his own house, is not obliged to consent to an inspection of them there. I cannot order that the defendants shall enter another party's house; the jurisdiction can only be enforced by production before the officer of the court.[2]

Mr *Wigram* suggested that it might be ordered that the documents should be produced, for the defendants' inspection, at some other house in the country.

THE LORD CHANCELLOR:—I fear I cannot do that. The court cannot depart from its practice, unless it is a matter of arrangement between the parties.

Mr. *Wigram* then said that the receiver was not in his own house; and that the house in which he was had been taken for the partnership purposes.

THE LORD CHANCELLOR:—The plaintiff is the managing partner: in point of fact, he was the managing partner in possession, and the court appoints him receiver: that does not turn him out of possession. I cannot alter the possession; I have no jurisdiction over the possession. I think [\*508] the master has jurisdiction to order the production of the documents; but I do not rest upon that. The order I propose to make is, that the receiver shall produce before the master all books in which there are any entries relating to his receipts or payments in respect of the partnership estate, or the carrying on by him of the partnership business, with liberty to seal up such parts as do not relate to those matters.[3]

At all events, I think the present orders cannot stand, because, if they did, they would, at some future time, be taken as a precedent.[4]

[2] *Prentice v. Phillips*, 2 Hare, 152, cited ante, 263, n. 1. But see *Grane v. Cooper*, ante, 263.

[3] As to sealing up parts of books, &c. see 1 Hoff. Ch. Pract. 308; 2 Sim. & Stu. 311, n. 1. Under the usual order for the production of books, &c. with liberty to seal up on affidavit such parts as did not relate to the matters in question, the defendants had produced a book with certain pages sealed up, and had made the required affidavit. The plaintiffs afterwards on an affidavit of facts leading strongly to the inference that one of the pages sealed up did relate to the question in dispute, moved that the defendants might produce the book unsealed; but the motion was refused, although the defendants declined to answer the affidavit. *Sheffield Canal Co. v. Sheffield & Rotherham Railway Co.* 1 Phillips, 484.

[4] When a defendant will be required to produce books and documents, see *Taylor v. Randell*

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 1839.—*Maund v. Allies*.
 

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“His lordship doth order that the receiver, John Maund, do produce before the master, on passing his partnership accounts, any books or accounts in his possession in which any entries have been made relating to the receipts or payments of the said receiver on account of the partnership estate, or the carrying on of the said partnership since his appointment as receiver thereof; with liberty to seal up such parts thereof as shall appear by affidavit to be made by him not to relate to the said receipts and payments.”

Reg. Lib. 1838, B. 493.

*April 12.*—On the 25th of March, 1839, publication in this cause then standing enlarged, by consent, to the first day of Easter term, the defendants Hair and Farquhar moved, before the Vice-Chancellor, that publication might be further enlarged, and that they might be at liberty to sue out a commission for the examination of witnesses if they should be so advised; upon which the Vice-Chancellor made an order that a commission should issue, returnable on the 31st of May, with liberty to apply to the [\*509] master for an enlargement of publication.

The plaintiff now moved, before the Lord Chancellor that this order might be discharged.

Mr. *Wakefield* and Mr. *Rogers*, in support of the motion, contended that the defendant had no right to give the notice of motion before the Vice-Chancellor; and that the order which the Vice-Chancellor had made was irregular, upon the ground that the commission could not be made returnable on a later day than that to which publication stood enlarged; and that the order was objectionable upon the further ground that it contained a recommendation to the master to enlarge publication. They said that, if it were necessary to go into the merits of the case, the delay which had taken place in applying for the enlargement was, of itself, quite a sufficient reason why it should not have been ordered.

Mr. *Jacob*, Mr. *Wigram*, and Mr. *Piggott*, *contra*, admitted that, as the matter at present stood, the commission was returnable at a day after publication would have passed.

THE LORD CHANCELLOR:—You seem to have begun at the wrong end. Enlarge publication first, and then you may get your commission as a matter of course. It cannot be right that the court should make an order which is to depend upon another order to be made by the master. Is this court to make an order which is to depend upon the discretion of the master? It is making an order before the time has come at which it can be properly made. It is saying that this court may make an order for a [\*510] commission, if the master shall please. If the master had no jurisdiction, upon the ground of publication having passed, the Vice-Chancellor's order ought to have embraced that also. It is quite irregular, however, to

Cr. & Ph. 104; *Murray v. Walter*, id. 114; 2 Sim. & Stu. 311, n. 1; 3 Myl. & Cr. 546, n. 1, 549, n. 1.

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 1839.—In re Cutler's Patent.
 

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have a commission returnable after publication has passed, without enlarging publication first; and I think that, upon that ground, the Vice-Chancellor's order must be discharged, except so far as it gave the plaintiff the costs of the application. I think the Vice-Chancellor ought to have refused the motion with costs.

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### In the Matter of JOB CUTLER'S Patent.

1839: April 20, 24; June 7, 19; December 24.

A party, who had lodged an unsuccessful *caveat* against the granting of a patent, ordered to pay to the patentee the taxed costs occasioned by the *caveat*. *Semble*, such costs will be taxed upon the principle upon which costs in a cause are taxed as between party and party.

In this case, Job Cutler, the party applying for the patent, had been put to considerable expense by reason of a *caveat* having been entered against the grant of the patent to him.

On the 20th of April, the Lord Chancellor determined, upon the merits of the case, that the patent should be sealed. Cutler's counsel then applied for the costs occasioned by the *caveat*, and the Lord Chancellor ordered that the case should be mentioned again, with reference to the question of costs.

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April 24.—Mr. Wigram now asked for the costs occasioned by [\*511] entering the *caveat*, and cited *Ex parte Fox*, (a) and an \*unreported case of *In re Alcock's Patent*, in December, 1832, in which, he said, Lord Brougham gave the patentee the costs occasioned by a *caveat*, and a case before the present Lord Chancellor, on the 20th of December, 1837, *In re Joyce's Patent*: but, upon the last case being mentioned, the Lord Chancellor said, that in that case the costs were given by consent; and this observation was confirmed by the solicitor general, who had been counsel in the matter.

THE LORD CHANCELLOR :—What made me doubt about the costs is this, that it is decided that, upon a petition of right, on which it is referred to the Chancellor to assist the Crown, no costs can be given. So, the application for a commission of review is made to the Crown, and the Crown refers it to the Chancellor to inquire; and it has been decided that the Chancellor has no jurisdiction to award costs. On inquiry, I find that the proceedings in patent cases cannot be traced further back than a few years.

*The Solicitor General, contra*, for the party who had entered the *caveat*.—Suppose an application should be made to the Crown to grant a court of quarter sessions to a particular borough, and a party should present a petition to your lordship, praying that the grant might not be made—the party thus coming forward, not exactly as a suitor, but as *amicus curiæ*, and the

(a) 1 V. & B. 67.



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1839.—In re Cutler's Patent.

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Crown being about to exercise an act of grace and favor ;—I do not see the power to give costs ; and Lord Eldon says, in *Ex parte Fox*, “ I do not like to give costs in a case of this kind ; I cannot say the jealousy on the other side was “unreasonable.” Does not that observation strictly [\*512] apply to this case ? Was not the jealousy in this case reasonable ?

Was it unreasonable for us to caution the court against the act it was about to do ? In *Ex parte O'Reilly*,<sup>(a)</sup> Lord Thurlow, in the year 1790, intimates that a party entering a *caveat* is not, as a litigant, confined to the objection which he has taken, but he may open the whole question. It must be admitted, however, that there was no question about costs in that case.

THE LORD CHANCELLOR :—As I stated before, if I had the jurisdiction, I should exercise it.

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June 7.—On the 7th of June, 1839, an order was made that the respondent should pay to the petitioner his costs of, and occasioned by, the *caveat*, and consequent thereon, such costs to be taxed by the master of the Court of Chancery in rotation, if the parties should differ about the same.

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Dec. 24.—The taxation was conducted, under this order, in the ordinary manner, and upon the principle upon which the taxation of costs between party and party in a chancery suit is conducted ; and Cutler, not being satisfied with this mode of taxation, presented a petition to the Lord Chancellor, stating that by such taxation “ all the travelling expenses of the petitioner and his solicitors incurred in procuring necessary evidence, ‘all counsels’ fees, and other expenses incidental to procuring a [\*513] speedy hearing of the matter ; and to consultations on the matter, all sums and fees paid to scientific and practical men for giving their time and evidence, (which could not have been procured without such fees ;) all charges and allowances claimed by the petitioner as compensation for his loss of time, and for his travelling and other expenses consequent upon his attending before the attorney general as a witness, to explain his invention, and also of his solicitor attending in town,” were disallowed, and that the bill of costs had been, by this means, reduced from 439*l.* 8*s.* 10*d.* to 146*l.* 11*s.* 4*d.* ; and praying that it might be referred back to the master to review his taxation, and to allow to the petitioner all costs, charges, and expenses reasonably incurred in consequence of the opposition to the patent.

This petition, being supported by affidavit, came on to be heard, before the Lord Chancellor, on the 24th of December, 1839. It was stated in the petition and affidavit that no taxation of the costs occasioned by a *caveat* had ever before taken place, and that the parties had, in all former cases, agreed upon the amount to be paid.

The Lord Chancellor dismissed the petition with costs.

(a) 1 Ves. jun. 112 ; see p. 118.

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 1839.—Harding v. Harding.
 

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[\*514]

\*HARDING v. HARDING.

1839: November 5, 8; December 10.

An order for a resale, made in consequence of the purchaser's default in completing his purchase, should not discharge him from his purchase.

THOMAS HAUGHTON HARDING, one of the defendants in this cause, having been allowed to bid for and become the purchaser of an estate sold under an order made in the cause, and having failed to pay his purchase money by the time appointed, the plaintiff presented a petition, praying, in addition to certain directions applicable to the peculiar circumstances of the case, that the defendant, T. H. Harding, might be discharged from his purchase, and that the estate might be resold, and that the defendant might pay the expenses arising from the non-completion of the purchase, and the expenses of that application, and the expenses of the resale, and might bear any deficiency in price which might arise therefrom; and this the Vice-Chancellor, upon hearing the petition, ordered accordingly, on the 6th of August, 1838.

The order for the original sale had been made in pursuance of an arrangement made between the parties after the institution of the suit; but, at the time at which the order was made, that arrangement had not been brought before the court by supplementary bill; and the defendant T. H. Harding now presented a petition of appeal against the order of the 6th of August, 1838, alleging that it was in contravention of that arrangement, and that it was improperly and irregularly obtained.

THE LORD CHANCELLOR expressed doubts whether the order appealed from was right in discharging the purchaser from his purchase, but [\*515] was of opinion that it was right in other respects; and his lordship ordered that it should be mentioned again.

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Nov. 5.—On a subsequent day, Mr. *Richards*, counsel for the respondents, referred to two cases of *Saunders v. Gray*, L. C. 16th December, 1811, and *Tanner v. Radford*, V. C. 8th May, 1834.(a)

(a) SAUNDERS v. GRAY.

1811: December 16.

"LORD CHANCELLOR:—Upon opening of the matter this present day unto the Right Honorable the Lord High Chancellor of Great Britain, by Mr. *Bell*, of counsel for the plaintiffs, it was alleged that, by an order in this cause, it was, among other things, ordered, that the freehold and leasehold estates of Edward Gray, deceased, the testator in the pleadings in this cause named, should be sold, with the approbation of Mr. Popham, then one of the masters of this court, to the best purchaser or purchasers that could be got for the same, to be allowed of by the said master: That in pursuance of the said order the said estates were sold before Mr. Thomson, the master to whom this cause stands transferred, in several lots; and at such sale John Sidney, having bid the sum of 515*l.* for the premises comprised in lot No. 29, the said master, by his report dated the 13th day of May, 1809, allowed the said John Sidney to be the purchaser of the premises comprised in the said lot, at that sum; and the said report stands absolutely confirmed by an order dated the 10th day of December, 1810: That the said John Sidney not proceeding to complete his said purchase, it was, by an order made in this cause, bearing date the 15th day of January, 1811, ordered that it

1839.—Harding v. Harding.

**\*THE LORD CHANCELLOR :—**This is a question of very great im- [\*516]  
portance, and it must, therefore, be ascertained what the practice is,  
and to what extent those who are selling estates under the \*decree [\*517]  
of the court can proceed against the purchasers. I find, however,

should be referred to Mr. Thomson, the master to whom this cause stands transferred, to see if a good title could be made to the premises comprised in lot 27, part of the estates in question in this cause, purchased by John Sidney : That in pursuance of the said order the said master made his report, bearing date the 18th day of November, 1811, and thereby certified that he had been attended by the solicitor for the plaintiffs and for the defendants, the trustees, none attending for John Sidney, in the said order named, the purchaser of the premises comprised in lot No. 27, part of the estates in question in this cause, although duly summoned for that purpose as by oath made thereof appeared : and in the presence of the solicitors aforesaid, he, the said master, had proceeded to inquire whether a good title could be made to the premises comprised in the said lot No. 27, and an abstract of the title to the said estate having been laid before him, he had perused and considered the same, and did conceive that a good title could be made to the said premises comprised in the said lot No. 27 : That by an order made in this cause bearing date the 28th day of November, 1811, it was ordered that the said report, bearing date the 18th day of November, 1811, and all the matters and things therein contained, should stand ratified and confirmed by the order, authority, and decree of this court, to be observed and performed by all parties thereto, according to the tenor and true meaning thereof, unless the said John Sidney, having notice thereof, should, within eight days after such notice, show unto this court good cause to the contrary : That due notice has been given to the said John Sidney of the said order dated the 28th day of November, 1811, as by affidavit appears, and no cause hath been shown to the contrary thereof, as by the registrar's certificate also appears. It was, therefore, prayed that the report of Charles Thomson, Esq., one of the masters of this court to whom this cause stands referred, bearing date the 18th day of November last, and by which he reports that a good title can be made to lot 27, part of the premises in question in this cause, may be absolutely confirmed ; and that John Sidney, who has been duly confirmed the purchaser of the said premises, may, on or before the 20th day of January next, pay in his purchase money, amounting to 515*l.*, together with the costs of this application, and all other costs incurred in confirming the said John Sidney as the purchaser of the said premises, and compelling him to complete the purchase thereof to be taxed by the said master ; and in default thereof that the said premises may be again put up for sale before the said master ; and in case of a deficiency on such second sale, then that the said John Sidney may be compelled to pay such deficiency, together with the costs of such second sale and the costs already incurred, and to be taxed as aforesaid : Whereupon, and upon hearing the said order dated the 10th day of December, 1810, the said order dated the 15th day of January, 1811, the said master's report dated the 18th day of November, 1811, the said order dated the 28th day of November, 1811, an affidavit of service of the said order dated the 28th day of November, 1811, upon the said John Sidney, and an affidavit of service of notice of this motion to the said John Sidney read, his Lordship doth order that the report made in this cause by Mr. Thomson, one of the masters of this court, bearing date the 18th day of November, 1811, and by which the said master has reported that a good title can be made to lot 27, of the premises in question in this cause, be absolutely confirmed. And it is ordered that it be referred to the said master to tax all parties their costs of this application, and all other costs incurred in confirming the said John Sidney as the purchaser of the said premises, and compelling him to complete the purchase thereof. And it is ordered that the said defendant John Sidney do pay such costs when taxed : and it is ordered that the said defendant John Sidney, who, by order bearing date the 10th day of December, 1810, stands absolutely confirmed the best purchaser of the premises comprised in the said lot No. 27, at the sum of 515*l.*, do, on or before the 20th day of January, 1812, pay the said sum of 515*l.* into the bank, with the privity of the accountant general of this court. to be there placed to the credit of this cause, subject to the further order of this court : and in default of the said defendant John Sidney his paying the said sum of 515*l.* into the bank by the time aforesaid, it is ordered that the said premises comprised in the said lot No.

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 1839.—Harding v. Harding.
 

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upon reference to the registrar, that search has been made, and that no case can be found except those which have been mentioned.(a) I do not  
 [\*518] \*know why a person purchasing under a decree of the court, should not be held to his contract as much as a person purchasing in the ordinary way.

(a) *Saunders v. Gray, and Tanner v. Radford.*

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27, be resold, with the approbation of the said master, to the best purchaser or purchasers that can be got for the same, to be allowed of by the said master; and in case the said premises comprised in the said lot No. 27, shall not be resold for so much money as the sum of 515*l.*, it is ordered that the said master do tax the costs of such resale. And it is ordered that the said John Sidney do pay the deficiency between the sum of 515*l.* and the sum for which the said premises shall be resold at such resale, to be ascertained by the said master, into the bank, with the privity of the accountant general, to be placed to the credit of this cause, subject to the further order of this court. And it is ordered, that the said John Sidney do pay the costs of such resale when taxed. And it is further ordered, that the person or persons who shall be allowed the best bidder or the best bidders at such resale, other than the said John Sidney, do, within ten days, make a deposit after the rate of 10*l.* per cent. on his or their biddings, the sum to be ascertained by the said master, into the bank, with the privity of the said accountant general, to be there placed to the credit of this cause, subject to the further order of this court; and in default of making such deposit by the time aforesaid, it is further ordered that the said biddings be considered as void, and that the said master, without further motion, do resell the premises comprised in the said lot."

Reg. Lib. B. 1811, fol. 1090.

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TANNER v. RADFORD.

1834: May 8.

"VICE CHANCELLOR:—Upon opening of the matter this present day unto this court by Sir George Grey of counsel for the plaintiffs, it was alleged that it appears by the affidavit of William Henry Tanner and Frederick Granby Farrant, that the deponent William Henry Tanner saith, that, pursuant to an order of this court made in this cause, the advowson of the rectories of Lapford and Nymet Rowland, in the county of Devon, and the fee simple and inheritance of several tenements commonly called Town Tenement and Hill Tenement, situate in the said parish of Lapford, were, with other lands, put up for sale by public auction in five lots, at the public sale room of this court in Southampton Buildings, Chancery Lane, London, on Wednesday, the 10th day of July last past; that the above named defendant John Arundel Radford attended such auction, and became the best bidder for, and has been since duly reported and confirmed the purchaser of, the first four lots comprised in the printed particular of such sale, consisting of the rectories of Lapford and Nymet Rowland, and the said tenements called Town Tenement and Hill Tenement, at the sum of 6880*l.* or thereabouts; that the conditions of the said sale or auction stipulated (amongst other things) that the purchasers should be furnished with abstracts of the title at the vendor's expense, upon application to their solicitors, and that the purchasers should pay their respective purchase moneys into the Bank of England for the said advowson, being lots 1 and 2, of the said hereditaments, on or before the 10th day of November then next, and for the remaining three lots on or before the 28th day of September then next, and in default thereof they should respectively pay interest on their respective purchase moneys from the periods aforesaid, at the rate of 5*l.* per cent. per annum, as on reference to the said particulars and conditions will more fully appear; that he, the said deponent, sent the said John Arundel Radford abstracts of title to the said four lots so agreed to be purchased by him as aforesaid, before the said 28th day of September last, and the said John Arundel Radford hath not, nor hath his attorney, solicitor, or counsel, or any other person on his behalf, made any objection whatever to the said titles, or to any or either of them, or to any part thereof, and the said deponent verily believes that the titles to the

1839.—Harding v. Harding.

\*The order made in that case, of the year 1811,(a) is the ordinary [\*519] remedy against a purchaser who does not complete; enforcing the lien against the estate so far \*as it will go. Discharging the purcha- [\*520] ser, and then suing him for damages, is not what this court does.

(a) *Saunders v. Gray.*

said lots, and to each of them, are, in all respects, good, marketable, and unexceptionable titles; that the said sum of 6880*l.* hath not, nor hath any part thereof, been paid into the said Bank of England pursuant to the said conditions of sale, but the whole thereof, with the interest due for the same, still remains due and owing from the said John Arundel Radford; but the said John A. Radford, by some means unknown to and unauthorized by the said deponent, took possession of the said tenement called Hill Tenement, on or about the 29th day of September last, and is still in the possession thereof; that the deponent knows and is well acquainted with the circumstances of the said John A. Radford, and he feels quite satisfied and sure that, in order to complete the said purchases, the said John A. Radford must borrow the whole of the said purchase money; that the said John A. Radford is the present incumbent of the said rectories of Lapford and Nymet Rowland, but that his life interest therein, or in the larger of them, is mortgaged or charged with considerable sums of money due to Mr. Zachary Turner, of the said city of Exeter, the attorney for the said J. A. Radford, or unto some client of his, or unto both, and that, although the said J. A. Radford now has, as the said deponent verily believes, an annual income of 700*l.* from the said rectories during his life, after paying the interest, &c. on the said mortgages, still the said deponent knows that the said J. A. Radford cannot of himself pay the said purchase moneys for the said rectories and hereditaments, and verily believes that no person will lend him the same, and that there is not the most distant probability of his ever completing the said purchase; that he, the said deponent, hath been informed, and he has no doubt whatever in his mind but that such information is true, that the said J. A. Radford hath left his residence at Lapford aforesaid, and appointed a curate to officiate in the said parish churches during his absence, for the purpose of evading the consequence of his non-completion of the said purchase, and to prevent his being taken into the custody of the serjeant-at-arms; that on Saturday, the 19th day of April, 1834, he, the deponent, together with the above named Frederick Granby Farrant, went to Lapford aforesaid, and to the residence of the said J. A. Radford there, and saw Mrs. Radford, the wife of the said J. A. Radford, who informed the said deponent, in the presence and hearing of the said Frederick Granby Farrant, that her husband, the said J. A. Radford, was not at home, and where he was gone she did not know, and when he would return she did not know, and where he may be found or addressed she did not know. And the said deponent, the said F. Granby Farrant, saith, that on Saturday last, the 19th day of April, he, the said deponent, accompanied the said W. H. Tanner to Lapford aforesaid; that previously to going to the residence of the said J. A. Radford, the said deponent was informed by several persons at Lapford aforesaid, and he verily believes such information to be true, that the said J. A. Radford had left his residence at Lapford aforesaid, and had appointed a Mr. Worthy as his curate; that the place of abode of the said John A. Radford was unknown, and the period of his return uncertain; that afterwards, on the same 19th day of April, the said deponent accompanied the said William H. Tanner to the residence or house of the said J. A. Radford, at Lapford aforesaid, and there saw the wife of the said J. A. Radford, who informed the said W. H. Tanner, in the presence and hearing of the said deponent, that the said J. A. Radford was not at home, where he was gone she did not know, nor when he would return she did not know, and where he may be found or be addressed at, she did not know. It was therefore prayed that the defendant J. A. Radford the purchaser of the premises comprised in lots Nos. 1, 2, 3, and 4, of the estates sold in this cause might, within ten days after service of this order, such service to be verified by affidavit, pay the sum of 6830*l.*, being the amount of the purchase moneys for the said lots, into the bank, with the privity of the accountant general of this court, to the credit of this cause, subject to the further order of this court; and in the event of the said J. A. Radford omitting to pay the said sum of 6880*l.* into court within the period aforesaid, then that the report of Mr. Trover, one of the masters of this court, dated



1839.—Harding v. Harding.

- [\*521] \*I think that there was great propriety in the order made in that case of the year 1811, and that it was quite in analogy to the course
- [\*522] the court takes against a \*purchaser in the ordinary case. Whether that shall be the practice for the future must be considered. It would seem to be introducing a new practice, although it has the high authority of Lord Eldon in the case of the year 1811.
- [\*523] \*If the parties require it, I will take time to consult with the other judges of the court, and state what shall be the course in future.
- [\*524] \*I think that the order should have been to hold the purchaser to his contract, and order the resale in the mean time.

the 13th day of November, 1833, by which the said J. A. Radford is reported the best purchaser of the said premises, and the order made by his Honor the Vice-Chancellor, on the 11th day of January last, whereby such report was absolutely confirmed, might be respectively discharged; and that the said J. A. Radford might deliver up possession of Hill Tenement to the receiver appointed in this cause, or that such receiver might be at liberty to take possession thereof; and that the said master might be directed forthwith to publish advertisements in the London Gazette and other papers for the resale of the said premises, whereof the said J. A. Radford was so reported the best purchaser; and that all the costs, charges, and incidental expenses attending the last sale, and incidental thereto, and occasioned by the default of the said J. A. Radford together with any loss or deficiency in price and interest arising by such second sale, may be ascertained by the said master: and that the same may be paid by the said J. A. Radford to Mr. John Pearson the plaintiff's solicitor, and that service of this order upon the clerk in court of the said defendant J. A. Radford may be deemed good service: Whereupon, and upon hearing Mr. Jemmett of counsel for the defendant Harriet Prestwood Radford and the infant, an affidavit of the plaintiff W. H. Tanner and F. G. Farrant, and an affidavit of service of notice to the other defendants, the master's report dated the 13th day of November, 1833, and the order dated the 10th day of January, 1834, read: 'This court doth order that the defendant J. A. Radford, the purchaser of the premises comprised in lots Nos. 1, 2, 3, and 4, of the estates sold in this cause, do, within ten days after service of this order, such service to be verified by affidavit, pay the sum of 6880*l.*, being the amount of the purchase moneys for the said lots, into the bank, with the privity of the accountant general of this court, to be there placed to the credit of this cause subject to the further order of this court; and in the event of the said J. A. Radford's omitting to pay the said sum of 6880*l.* into the bank, to the credit of this cause as aforesaid, within the period aforesaid, then it is ordered that the report of Mr. Trower, one of the masters of this court, dated the 13th day of November, 1833, by which the said J. A. Radford is reported the best purchaser of the said premises, and the order made in this cause on the 11th day of January last, whereby such report was absolutely confirmed, be respectively discharged. And it is ordered that the said J. A. Radford do deliver up possession of Hill Tenement to the receiver appointed in this cause, or such receiver is to be at liberty to take possession thereof. And it is ordered, that the said master do forthwith publish advertisements in the London Gazette, and such other public papers as he shall think fit, for the resale of the said premises whereof the said J. A. Radford was so reported the best purchaser. And it is ordered, that all the costs, charges, and incidental expenses attending the last sale, and incidental thereto, and occasioned by the default of the said J. A. Radford, together with any loss or deficiency in price and interest arising by such second sale, be ascertained, taxed, and settled by the said master; and it is ordered that the said J. A. Radford do pay the same, when ascertained by the said master as aforesaid, into the bank, with the privity of the accountant general of this court, to be there placed to the credit of this cause, subject to the further order of this court. And it is ordered, that the costs of all parties, except the said defendant J. A. Radford, be costs in the cause. And it is ordered, that the service of this order upon the clerk in court of the said defendant J. A. Radford be good service on the said defendant."

Reg. Lib. B. 1833, fol. 1001.



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1839.—*Du Hourmelin v. Sheldon.*

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I will communicate with the other judges of the court, and, if they see no objection to making that order of 1811 the rule of the court, I think it will be proper that it should be so.

*Dec. 10.*—His lordship subsequently made an order, dated the 10th of December, 1839, in the following terms:—

“His lordship doth order, that so much of the order dated the 6th day of August, 1838, as directs the defendant Thomas Haughton Harding to be discharged from his purchase in the said order mentioned be discharged; and it is ordered that the rest of the said order be affirmed.” Deposit to be returned.

Mr. *Wigram*, and Mr. *Kenyon Parker*, and Mr. *Richards*, and Mr. *Turner*, were counsel in the case.

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\**Du Hourmelin and Others v. Sheldon and Others.* [\*525]

*Du Hourmelin and Others v. The Attorney General.*

(*By Original and Supplemental Bills.*)

1839: May 27, 29; June 29; July 6; November 6.

A testatrix devised a real estate to trustees, upon trust to sell, and to divide the produce of the sale amongst certain persons, some of whom were aliens. The estate was sold under a decree of the court. Held, that the Crown was not entitled to those shares of the produce of the sale which were payable to the aliens.

THE original cause was instituted for the purpose of carrying into execution the trusts of a will, by which the testatrix had appointed and devised a real estate to trustees, who were all British subjects, upon trust to sell it, and to divide the produce among certain persons, some of whom were aliens. The decree having directed the sale of the estate, the Earl of Radnor became the purchaser; but he objected that a good title could not be made, upon the ground that some of the *cestuis qui trust*, amongst whom the purchase money was to be divided, were aliens. The master having reported in favor of the title, the Earl of Radnor excepted to his report; but the exceptions were overruled by the Master of the Rolls. A full report of the argument at the Rolls will be found in the first volume of Mr. Beavan's Reports.(a)

The Earl of Radnor (the purchaser) now appealed from the order of the Master of the Rolls, overruling the exceptions to the master's report of a good title.

The Solicitor General, Mr. *Bellenden Ker*, and Mr. *Elderton*, for the purchaser, in support of the objection to the title.

*Fourdrin v. Gowdey*,(b) is a direct authority in favor of the ob-

(a) Page, 79.

(b) 2 Mylne & Keen, 383.

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[\*526] jection. The rule, that an alien cannot hold \*land, is a doctrine, not of tenure, but of policy. It is clear, that a devise in trust for an alien is no less void than a devise directly to the alien himself; and if it were competent for the testator to direct that his lands should be sold, and the produce paid to an alien, that form would be adopted of giving to the alien the land itself; for it is a familiar doctrine that a party, to whom the produce of land directed to be sold is given, may elect to take the land itself. The case of the *Attorney General v. Duplessis*(a) shows, that a gift to an alien of even a contingent interest in land is void; and, further, that the court will interfere, on behalf of the Crown, to declare such a gift void. The case of the *Attorney General v. Sands*(b) and Rolle's Abridgment,(c) as well as the case of *Attorney General v. Duplessis*, show instances in which the court has held, that an equitable interest in land which is given to an alien devolves upon the Crown; and the same result attends the gift to an alien of the bare legal estate; *King v. Boys*.(d) The act 13 G. 3, c. 14, enabling aliens to lend money on mortgage of estates in the West Indian colonies, shows, that those who framed it considered that aliens could not take even the slightest interest in land of any kind; and the only exceptions (if exceptions they can be called,) to the rule that aliens shall not be interested in land, are, that an alien may have the benefit of an *elegit*, and that an alien merchant may have a leasehold house for his residence; but the benefit of an *elegit* is expressly given to the merchant by the statute *De Mercatoribus*.(e) The purchaser cannot safely pay his purchase money into court, for he has notice that the attorney general, who has at least a contingent interest

[\*527] \*in it, is not a party; *Giffard v. Hort*,(g) *Barclay v. Russell*.(h)

In many cases in which the circumstances have been the same as those of the present case, the title of the court[1] to the produce of the sale has been considered clear, and the parties have submitted their claims to the merciful consideration of the Crown.

Mr. *Wigram* and Mr. *Parry*, for the plaintiffs, some of whom were aliens, and were interested in the produce of the sale.

The two questions which arise in this case are perfectly distinct. The first is, whether the sale is not good; and the second is to whom the purchase money is to belong. As to the first, when the court has made a decree for a sale, and the money has been paid into court, the court is not in the habit of holding the purchaser responsible for the application of the money, upon the ground that some persons, who are not before the court, may have an interest in it. A purchaser who buys of trustees, whose receipts are declared to be good discharges, need make no further inquiry; and so a purchaser, who buys under a sale made by the court, is discharged from liability

(a) *Parker*, 144.(b) *Hardres*, 488; see p. 495.(c) *Page*, 194.(d) *Dyer*, 283, b.(e) 13 *Edw.* 1, st. 3.(g) 1 *Sch. & Lef.* 386.(h) 3 *Ves.* 424; see p. 436.

[1] Crown?

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by paying his purchase money into court; 3 Sugd. V. & P. ;(a) *Curtis v. Price*,(b) and even if he were held to be bound to see that the money was rightly distributed, that obligation would not affect the validity of the sale or of the purchaser's title. Upon the second point, suppose the case of a conveyance in trust to sell, and to pay scheduled creditors, one of whom is an alien; he thus becomes entitled to an interest in land; but is the Crown in such a case to step in and claim his interest? Suppose a man, whose \*personal estate is insufficient to pay his debts, devises his [\*528] land upon trust to sell, for the purpose of paying them, and one of the creditors is a foreigner; is he not to have the benefit of the devise? So, if a trader, who has alien creditors, becomes bankrupt, are not the assignees to sell the trader's real estate?

Assuming, in this case, that the alien might claim the land instead of the money, yet, if he has not in fact claimed it, no objection to the devise exists. The dry proposition of the law is, that an alien cannot hold land: he may take, but he cannot hold. In this instance, however, has the purchaser shown that aliens have taken the land?

Upon the whole, the only question is, whether the court thinks there is any sufficient reason for requiring the presence of the Crown as a party to the distribution of the fund.

Mr. *Richards*, Mr. *Campbell*, Mr. *Bethell*, and Mr. *Fleming*, appeared for other parties.

*The Solicitor General*, in reply cited *Roper v. Radcliffe*.(c)

THE LORD CHANCELLOR expressed an opinion, that it would be the better course to make the attorney general a party, on behalf of the Crown, by supplemental bill.

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June 29.—On a subsequent day, Mr. *Wigram* mentioned to the Lord Chancellor that a supplemental bill had been filed, \*bringing [\*529] the attorney general before the court. The Lord Chancellor then said that his reason for desiring that the attorney general should be made a party was, that, whatever might be his lordship's opinion, as between the parties then before him, his decision would not bind other parties. There was no doubt as to the power to sell; the only question was whether, some parties being aliens, a good title could be made. The case might now be disposed of as to the purchaser, the attorney general being here to claim the fund; and the Master of the Rolls' decision might be affirmed, and the money ordered to be paid in to the credit of both causes. Care must be taken that the order was intituled in the supplemental cause in which the attorney general was a party, as well as in the original cause.

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July 6.—The attorney general afterwards appearing, and not objecting to the sale, an order was made, overruling the exceptions, and directing that the money should not be paid out without notice to the attorney general.

(a) Page 156, 10th edition.

(b) 12 Ves. 89.

(c) 9 Mod. 167.

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It was arranged, with the consent of Mr. *Wray*, on the behalf of the attorney general, that the question of the right of the Crown should be determined by the Lord Chancellor upon the argument which had already taken place upon the purchaser's appeal from the Master of the Rolls' order.

**Nov. 6.—THE LORD CHANCELLOR :—**The parties having very properly consented to discuss the question, which was raised with the purchaser under a decree for sale of the estate, in a cause in which the attorney general was to be a party, the proceedings in this cause were instituted for that purpose, and the question now to be decided is, whether the Crown has any title to those shares of the proceeds of the testatrix's estate which she has, by her will, appointed to persons who are aliens.

Elizabeth Sheldon, having a power of appointment over the estate in question, by her will appointed all the estate to certain persons, to the use of them, their heirs and assigns, for ever, upon trust, after her decease, to sell the same, and to convey the same to purchasers, and to give receipts for the purchase moneys, which it was declared should be effectual discharges to the purchasers. She then directed the trustees to stand possessed of the moneys to arise from such sales, upon trust, after payment of the expenses, and of the mortgages affecting the estate, to invest the residue in the public funds, and to stand possessed of such moneys and securities, as concerning certain one-sixth parts thereof, upon trust for certain persons who are aliens.

The attorney general being made a defendant, the question is, whether the Crown has any title to these shares. If it had not been for the case of *Fourdrin v. Gowdey*,<sup>(a)</sup> I cannot think that any such question would have been raised; and, upon considering the grounds of that decision, I do not find that I am called upon to express any opinion upon it, because I think it clear that the principles upon which Sir J. Leach proceeded, assuming them to be well founded, cannot govern the present case; and it is therefore immaterial, for the present purpose, whether such principles properly led to that decision.

[\*531] \*In that case, the testator, by his will duly attested, gave and bequeathed all his freehold and copyhold estates, and all his personalty, to be sold by his executors, and he enjoined and requested his heir at law, to concur with his executors in the sale of his freehold and copyhold estates; and he bequeathed all the residue of his property, after payment of his debts, &c., amongst certain persons, some of whom were aliens. On behalf of the Crown, Mr. *Wray* argued that the will vested no estate in the executors, who took a mere power of sale, the estate itself devolving upon the heir, or, as the heir was an alien, upon the Crown, and that the testator did not direct a total conversion, but only a conversion for certain purposes. Sir J. Leach adopted this reasoning, saying, that the argument wholly failed that this was

(a) 3 Mylne & Keen, 383.

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a bequest of money, and not a devise of land, and that the testator had given to the devisees the lands, subject only to the charge imposed on it by the will, viz., payment of debts and legacies, and that aliens could no more take an interest in land, which that would be, than the land itself. His honor, however, ordered a second argument, when the attorney general, on behalf of the Crown, admitted that where the purchase and conveyance were made directly from the executors, the purchaser claimed as devisee, and that the title of the Crown, was excluded, but contended that in that case the executors having only a power, and not an estate, the title of the purchasers could not be under the will, but through the heir of the devisor, and that heir being an alien, the estate, upon the testator's death, would, by a paramount title, immediately vest in the Crown. In finally deciding in favor of the Crown, his honor put his judgment upon this, "that the freehold and leasehold premises retained their proper quality at the testator's death, and passed by his will, not as money, but as freehold and leasehold estate, and that 'no interest in them could vest in his brother and sister who were [\*532] aliens."

Now, whether or no the grounds upon which this judgment is founded will support it, is a question which will be to be decided when facts identical with the circumstances of that case shall arise. It is sufficient, at present, to observe that such is not the present case, in which it cannot be said that there is not a devise of the real estate, or that there is not an absolute conversion, but merely a devise of lands subject to a charge. The purchase and conveyance must be derived from the trustees, in which case it was admitted that the title of the Crown is excluded.

If the Crown be entitled in this case, it must be entitled to all money left or payable to aliens, if raised out of lands in this country; and if so, why is this title of the Crown not to operate against the legacies of alien legatees, or the dividends of foreign creditors of a bankrupt, if such legacies and dividends be raised out of land; and how are foreign creditors entitled to payment of their debts under decrees of the court, or in the administration of the estates of deceased debtors, if the money applicable to such payment be the produce of land?

It was argued, that after payment of the charges, the legatees might elect to take the estate as land; but not only has that not taken place, but what the attorney general claims is money, and not land, which has been sold.

The incapacity of aliens to hold land is founded upon political and feudal reasons, which do not apply to money. The testator has given to his legatees no option; but if \*he had, or if the law would have [\*533] given it, there can be no reason for the legatee forfeiting money which he may enjoy, because he might have elected, instead of such money, to take land which he cannot.

Many authorities were referred to, but none of them bear out the proposition contended for on behalf of the Crown. Decisions, that aliens cannot

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enjoy, against the Crown, trusts of land, any more than the land itself, leave untouched the present question.[1] *Roper v. Radcliffe*(a) was relied upon, although that was the case of a papist, and not of an alien. By the act 11 & 12 W. 3, c. 4, all estates, terms, and other interests and profits whatsoever out of lands, to or in trust for the benefit of papists, were made void. The testator conveyed lands to trustees, upon trust to sell, and with the proceeds to pay certain debts, and to dispose of the residue as he should by deed or will appoint, and, in default, to dispose thereof, for the benefit of himself and his heirs. No sale took place, and the testator, by his will, referring to the trusts, gave certain sums to be paid out of the proceeds of the sale, and then gave all the rest and residue of his estate, real and personal, and all his remainder, whether in lands or personal estate, to certain persons who were papists. It was decided that the devisees had an interest in the lands, so remaining unsold, within the meaning of the act.

This case is inapplicable, not only because the question arose under an act of Parliament which has no reference to the situation of the parties in this cause, but because the state of the property was altogether different; and yet this was the case which has the strongest apparent analogy to the present, excepting that of *Fourdrin v. Gowdey*.

[\*534] \*Being of opinion that there is no principle upon which the claim of the Crown can be supported, and that there are no authorities compelling me to decide in its favor, I do not hesitate to affirm the judgment of the Master of the Rolls, pronounced under circumstances much less favorable to the parties claiming under the will—being in a contest with a purchaser—and to declare that the Crown has no title to the property in question.[2]

(a) 9 Mod. 167.

[1] An alien cannot indirectly, and through the intervention of a trustee become a purchaser so as to acquire an indefeasible title as against the state. *Leggett v. Dubois*, 5 Paige, 114. Yet, on the principle of equitable conversion, a trust to sell land and pay over the proceeds to an alien, is valid. *Anstice v. Brown*, 6 Paige, 454. Such is the doctrine of the case in the text.

[2] Where the agent of an alien for the collection of a debt, takes a conveyance of land from the debtor, in his own name, for the purpose of sale and applying the proceeds to the payment of the debt, there is a valid trust in favor of the alien. Can it, in such a case, make any difference whether the transaction was with or without the previous direction or assent of the alien? *Anstice v. Brown*, 6 Paige, 448, cited 1 Beav. 93, n. 1. As to the disability of alienage, see *Mooers v. White*, 6 Johns. Ch. Rep. 360. See further, *Leggett v. Dubois*, 5 Paige, 114; *Wright v. Trustees of Methodist Episcopal Church*, 1 Hoff. Ch. Rep. 223.



1839.—Rowley v. Adams.

ROWLEY v. ADAMS.

1839: April 20, 24; November 21.

Executors, whose testator was the assignee of a leasehold estate, of which the rent was greater than its yearly value, were ordered by the court to take such steps as might be necessary to relieve the testator's estate from liability in respect of the rent and covenants of the lease. The executors endeavored to prevail upon the lessor to accept a surrender, but he refused to do so; and they took no other steps towards complying with the order.

Held, that the executors ought to have assigned the lease to some other person; and that not having done so, they were bound themselves to exonerate the testator's estate from the liabilities to which it had been subject in respect of the lease since the time at which they might have made such an assignment.

HENRY WYATT, the testator in this cause, was the assignee of a lease for years, which, by his will, he bequeathed to the defendants Samuel Adams and Edmund Marks, in trust for his son William Wyatt, who was also a defendant in the cause; and he appointed Adams and Marks his executors; and they proved his will. The rent reserved by the lease was so great as to make the lease of little or no value, and the testator's son, William Wyatt, declined to take an assignment of it. The assignment of the lease made to the testator had been made to him in the usual form, subject to the payment of the rent and performance of the covenants reserved and contained in and by the original lease, and from thenceforth, on the lessee's or assignee's part, to be paid, kept, done, and performed.

\*By an order of the court, made on the 23d of July, 1833, on the [\*535] petition of the plaintiffs, it was referred to the master to consider and state to the court what course it would be advisable to adopt with respect to the hereditaments comprised in the lease, and certain freehold hereditaments of the testator which had been occupied by him in his business together with the leasehold hereditaments, with a view to the benefit of the testator's estate, and the persons entitled thereto or to claims thereon; and to approve, if he thought fit, of a plan for letting the same, or any part thereof; and to inquire whether it would be fit, and for the benefit of the testator's estate, and the parties interested therein, that the property should be improved by means of an expenditure thereon, or that the same, or any part thereof, or the materials thereof should be sold; and it was ordered that he should consider and state to the court in what manner and from what fund the yearly rent of 230*l.*, being the rent of the leasehold premises, should be paid, and whether the liability to pay the same was or could be removed, with liberty to state special circumstances.

The master, by his report, dated the 3d of August, 1833, stated his opinion that it would be desirable, with a view to the benefit of the testator's estate, and the persons entitled thereto and to claims thereon, that the receiver in the cause should be discharged as to the leasehold estate; and the defendant William Wyatt having, before the master, declined to take an assignment of it, the master approved of the defendants Adams and Marks taking such steps as might be necessary to dispose thereof upon the best terms they might be able, so as to relieve the testator's estate from all claims and lia-

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bilities for rent or covenants from and after the 29th of September then next.

[\*536] \*By an order of the court, dated the 10th of August, 1833, it was ordered that the master's report should be confirmed, and that the receiver should be discharged, as to the leasehold estate, from and after the 10th of September then next; and that the defendants Adams and Marks should take such steps as might be necessary, in order to put an end to all liability on the testator's estate to the payment of the rent and performance of the covenants reserved and contained in the indenture of lease; and it was ordered, that the receiver should pay the half-year's rent which would become due at Michaelmas then next, and should be allowed the same in passing his accounts.

By an order of the Master of the Rolls, dated the 22d of December, 1837, his lordship declared that the defendants Adams and Marks had not used due diligence in carrying into execution the order of the 10th of August, 1833, and it was referred to the master to inquire and state whether, if the defendants Adams and Marks had used due diligence, they could have terminated the liability of the testator's estate at Michaelmas, 1833; and if not, at what time and when first they could have terminated such liability; and the master was to be at liberty to state special circumstances.

On the 2d of August, 1838, the master made his report, in pursuance of the last mentioned order, by which he found, that on repeated occasions in the years 1834, 1835, and 1836, the solicitor of the defendants Adams and Marks endeavored to prevail on the solicitor of the lessors to accept a surrender of the leasehold premises, or to state on what terms his clients would accept the same; and that such endeavors were not attended with success; but that no evidence had been laid before him to show that any attempt was [\*537] made by the \*defendants Adams and Marks, or either of them, or by their solicitor, to assign the lease: and the master was of opinion, that if the defendants Adams and Marks had used due diligence, they would have terminated the liability of the testator's estate for rent and covenants after the 29th of September, 1833, between the 10th of August, 1833, and Michaelmas, 1833, by executing an assignment of the lease.

On the 5th of November, 1838, the Master of the Rolls made an order, confirming the last mentioned report, and declaring that the defendants Adams and Marks were bound to exonerate the testator's estate from all liabilities in respect of the leasehold premises under the lease before mentioned, since the 29th of September, 1833.

The leasehold premises had been unoccupied during the whole or a considerable part of the time which had elapsed since Michaelmas, 1833.

The lease expired on the 25th of December, 1838.

In the month of January, 1839, the defendants Adams and Marks presented a petition of appeal to the Lord Chancellor, alleging that the order of the 10th of August, 1833, had been applied to a purpose not contemplated when

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that order was made, and that it had had a construction put upon it, and an effect given to it, which the petitioner did not believe could have been put upon or given to it; and that the petitioners were aggrieved by so much of that order as directed that the petitioners should take such steps as might be necessary in order to put an end to all liability on the testator's estate to the payment of the rent and performance of the covenants reserved and contained in the indenture of lease. The petitioners, therefore, ap- [538] pealed from that part of the order of the 10th of August, 1833; and they also appealed against the before mentioned orders of the 22d of December, 1837, and the 5th of November, 1838.

It was stated, in the petition of appeal, and also on affidavit, that the lessors' solicitor believed that the defendants Adams and Marks were personally liable to the payment of the rent and performance of the covenants, and that, on that account, he was unwilling to accept a surrender of the lease, being satisfied with their responsibility.

The petition of appeal having now come on to be heard, affidavits were read in support of it, and in opposition to it; but it will be seen, on perusing the judgment, that it is unnecessary to state their effect.

It is conceived that the nature of the arguments used in support of, and in opposition to the petition of appeal, sufficiently appear in the judgment.

Mr. Knight Bruce and Mr. James Russell, for the appellants.

Mr. Richards and Mr. Bethell, contra.

Mr. Stevens, for other parties.

The following cases were referred to: *Valliant v. Dodemede*, (a) *Taylor v. Shum*, (b) *Staines v. Morris*, (c) *Onslow v. Corrie*, (d) *Wilkins v.*

*Fry*, (e) *Burnett v. Lynch*, (g) *Wolveridge v. Steward*. (h) Refe- [539] rence was also made to sect. 75, of the bankrupt act, 6 G. 4, c. 16.

Nov. 21.—THE LORD CHANCELLOR:—The object of this appeal is, that the appellants may be relieved from the effect of an order of the Master of the Rolls of the 5th of last November, by which it was declared that they, the executors of Henry Wyatt, the testator, are bound to exonerate his estate from all liabilities, in respect of certain leasehold premises, since the 29th of September, 1833. It is merely a declaration of liability, and contains no directions for payment, and leaves it open what such liabilities may be. I observe this, because it was argued, on behalf of the appellants, that the legatee of the lease had, by his conduct, taken upon himself all liabilities in respect of the lease, and that the testator's estate had been relieved therefrom. If that be so from any transactions between the legatee and the lessors, the executors will have the benefit of it when the demand is made; but, as the matter now stands, if the order be right upon the merits, the executors have no ground for this objection. The leaseholds in question are, by the order

(a) 2 Atk. 546.

(b) 1 B. & P. 21.

(c) 1 V. & B. 8.

(d) 2 Mad. 330.

(e) 1 Mer. 244.

(g) 5 B. & C. 589.

(h) 1 Crompt. & Mee. 644.

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of the 23d of July, 1833, treated as part of the testator's estate, and have been so considered ever since, and the only question has been, whether the estate or the executors personally are liable to the burden of that lease from September in that year. Another point taken in argument upon this hearing, which does not appear to have been raised in former proceedings, was,

that the testator, though only assignee of the lease, had so become [\*540] liable to the covenants as that his estate could not be "relieved from

future liability upon them by assignment, upon the ground that the assignment was made expressly subject to the payment of the rent, and performance of the covenants by the lease reserved and contained, and from thenceforth on the lessee's or assignee's part, to be paid, kept, and performed. I cannot consider this as matter of doubt after the decision, in the Exchequer Chamber, of the case of *Wolveridge v. Steward*.(a)

Assuming, then, that the liability now in question arises only from the continued holding of the lease, the question is, whether that burden is to be borne by the testator's estate, that is, by the legatees, or by the executors personally.

In July, 1833, it being foreseen that, from the determination of the sub-tenancy in September, then next, the lease would probably become a burden, a reference was, on the 23d of July, 1833, made to the master, to inquire what should be done with respect to the lease, and whether the liability to pay the rent was or could be removed. What passed before the master upon this reference is matter of dispute upon the affidavits: I think it quite immaterial, the report and the order upon it being that which alone ought to affect the question; but I cannot but observe, that the master's note differs widely from the representation, on the part of the appellants of what did pass. By his report, the master approved of the executors taking such steps as might be necessary to dispose of the lease upon the best terms they might be able, so as to relieve the estate from all claims and liabilities for rent or covenants

from and after the 29th of September then next. By the order made [\*541] "upon this report, dated the 10th of August, 1833, which is the first appealed from, it was ordered "that the executors do take such steps as may be necessary in order to put an end to all liability on the testator's estate to the payment of the rent and the performance of the covenants reserved and contained in and by the said lease." How far this order was by consent, I do not inquire, as it is not, I understand, so drawn up; but it is certain that the order was never complained of, by way of appeal, till 1839, after the lease had expired, and all the liability to the covenants had been incurred.

There cannot be a doubt as to the meaning of this order. The case common to all was, that the lease was not worth the rent payable upon it. There were but two ways in which the liability to the covenants in the

(a) 1 Crompton & Moeson, 644.

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lease could be put an end to ; the one by procuring the lessor to accept a surrender, and the other by assigning it to some other person : both, probably, were open upon the order, but to adopt one or other was imperative.

Whether it was morally right or not to assign the lease, merely for the purpose of getting relief from the covenants, was not a subject for the executors to consider, after this order. The court had ordered it, and nothing but proving the impossibility of executing the order could relieve them. This they knew, or ought to have known. If they thought the order wrong, they ought to have applied to have it altered. Not having done so till after all the injury had accrued, they could not, under any circumstances, have been heard to justify their disobedience of the order by showing that it was morally wrong ; but I am clearly of opinion, with the master, as I collect his opinion from his note, and with the Master of the Rolls, that the order was perfectly \*right. The law imposes upon the assignee of a lease [\*542] liability to its covenants only during the time he holds it. To assign to a person unable to perform the covenants, for the purpose of injuring the landlord, or without giving him a fair opportunity of protecting himself from injury, is, no doubt, highly improper ; but why is the landlord to impose upon the assignee a greater or larger responsibility than the law imposes ? Why is he to refuse to accept a surrender of the lease, or to take an assignment of it from the party holding it, and to complain of the assignee relieving himself from the burden of it by such means as the law allows ? I think that the assignee, after such offer and notice to the landlord, is quite justified in so securing himself, doing as little injury to the landlord as possible ; and if a beneficial owner is justified in so doing, trustees for others are bound to do so : and, in addition to such obligation, there was, in this case, an order which, in effect, directed them so to act. The moral as well as the legal right of an assignee so to relieve himself from the obligations of the lease is illustrated, with his usual accuracy and research, by Sir Thomas Plumer, in *Onslow v. Corrie*.(a)

Being of opinion that this order was right, the next question is, did the executors do their utmost to execute it ? This leads to a consideration of the evidence upon the affidavits ; and a very few observations upon that subject will be sufficient, because it forms no part of the case of the executors that they ever attempted to assign the lease, or that there would have been any difficulty in their so doing ; but even if their duty had been limited to endeavoring to induce the landlords to accept a surrender, I do not think that they would have had a much better case. The applications for that \*pur- [\*543] pose were not made at the times, or in the manner, which the duty required. If, instead of at once acquiescing in the refusal of the landlords, upon the ground that they were satisfied with the responsibility of the executors, they had proved to them that such responsibility would continue

(a) 2 Madd. 330.



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only till an assignment had been executed, the negotiation must have met with a very different result ; but it is not necessary to pursue that consideration, because, in my opinion, it was their duty, upon such refusal, to adopt the only mode of obeying the order, namely, assigning the lease, or, at least, applying to the court for further directions, neither of which they did.

The order of the 22d of December, 1837, also appealed from, declares that the executors had not used due diligence in carrying into execution the order of the 10th of August, 1833, which proposition is, I think, clearly established upon the evidence of the appellants themselves. It then referred it to the master to inquire whether, if they had used due diligence, they could have terminated the liability of the testator's estate at Michaelmas, 1833, or, if not, at what time and when first they could have terminated such liability. This inquiry was altogether for the purpose of carrying into effect the necessary result of the prior declaration, and cannot be objected to if such declaration was right. The master, by his report, found that the executors might have terminated such liability between the 10th of August and Michaelmas, 1833, by executing an assignment of the lease. It was no part of the case before the master, or in the argument before me, that the executors had used all due diligence in attempting to assign the lease, but had not been able to succeed ;

their defence being that they were justified in abstaining from doing [\*544] so ; and yet one of their objections to the report \*was, that there was not evidence that they could have assigned the lease. I consider that they were ordered so to assign the lease, if no other means were found (in the terms of the order of the 10th of August, 1833,) of putting an end to all liability on the testator's estate to the payment of the rent and the performance of the covenants of the lease. This they have not done, and it it was, therefore, for them to show that they had not been able to do so. I think, therefore, that no objection can be made to the master's finding ; but, if so, the declaration of the order of the 5th of November, 1838, was the necessary consequence, in declaring, in effect, that the estate was not to bear the burden of the liabilities incurred since the 29th of September, 1833.

In August preceding the executors were ordered to do what was necessary to relieve the estate from such liabilities. The master, upon grounds which I think well founded, reports that they had the means of doing so. Not having done so, they have become personally liable to the landlord for such liabilities. Why are the legatees, who gave to the executors ample warning of the liability they were incurring, and repeatedly urged them to terminate such liability in the only way it could be effected, to bear this loss wantonly incurred by the executors, by their disobedience to the order of August, 1833 ? I entirely concur in the judgment of the Master of the Rolls, and must therefore dismiss the appeal with costs.[1]

[1] The bill in the above case was filed in January, 1831. It has been a protracted, complex and evidently angry litigation. It came up again before the Master of the Rolls, in March and



1839.—Petty v. Lonsdale.

\*PETTY v. LONSDALE.

[\*545]

1839 ; November 25, 26.

After an attachment against a defendant for want of his answer has been sealed he cannot refer the bill for impertinence ; and if the attachment bears date on the same day as the order of reference, it will take precedence of the order.

*Semble* also, that the order of reference will not stand unless it be not only obtained but served before the date of the attachment.

In this case, the defendant, George Pleydell Wilton, was served, on the 29th of August, 1839, with a subpoena to answer a bill of revivor and supplement. He appeared on the 3d of September, and, being resident in London, would be entitled to eight weeks time to put in his answer. That period expired on the 29th of October. On the 6th of November he delivered exceptions to the bill, for impertinence, and on the 7th of November he petitioned for and obtained an order to refer those exceptions to the master ; but he did not serve that order until the 8th of November. In the meantime, on the 7th of November, the plaintiffs sealed an attachment against him, for contempt in not putting in his answer, and, on the same day, the plaintiffs' solicitor served the defendant's clerk in court with a notice that the defendant was in contempt, and that, should an order to refer the exceptions be obtained, an application would be made to discharge it.

The plaintiffs then moved, before the Master of the Rolls, that the order referring the exceptions might be discharged, and that the service of it might be set aside with costs.

This application was refused by the Master of the Rolls, with costs, on the 16th of November, and his lordship subsequently, on the 21st of November, on the motion of the defendant, of which notice had been given on the 18th, discharged, with costs, the order for the attachment.

\*The plaintiffs then gave notice of a renewed motion, before the [\*546] Lord Chancellor, for the discharge of the order of reference, and also of a motion that the orders made by the Master of the Rolls on the 16th and 21st of November might be discharged with costs.

The renewed motion at first came on alone before the Lord Chancellor.

Mr. *Wakefield* and Mr. *Steere*, in support of the motion, contended that when a defendant has allowed the time for answering to expire, it is too late for him to refer the bill for impertinence ; since, under the old practice of obtaining orders for time, a reference for impertinence could not be made after such an order obtained ; *Ferrar v. Ferrar* ;(a) and that, in fact, the re-

May, 1844, on exceptions to the master's report. The general history of the cause from its commencement to that period will be found in 7 Beav. 395 to 424, where however, there is nothing touching the incidental point decided *supra*. An appeal to the House of Lords was pending, at the time of the reporter's note, 7 Beav. 424, n. (a). As to liability of an equitable assignee of a lease for breaches of covenants contained in the lease ; see *Close v. Wilberforce*, 1 Beav. 112 ; *Senders v. Benson*, 4 Beav. 350.

(a) 1 Dick. 173.

1839.—Petty v. Lonsdale.

ference in the present case was not made until after the defendant was in contempt; for the order of reference could only date from the time at which it was served, which was the day after the date of the attachment: *Taylor v. Harrison* : (a) and even if that were not so, the attachment would take precedence of the order of reference, which bore date the same day as the attachment: *Stephens v. Neale*, (b) *Whitehouse v. Hickman*. (c)

Mr. *Chapman*, (in the absence of Mr. *Richards*,) *contra*.

THE LORD CHANCELLOR asked, how the defendant, whilst under attachment could obtain the order of reference? His lordship said, that when he got that order, the court had, by the attachment, adjudged him to be in contempt for not answering, and that it would not do for him to say that the attachment was irregular, whilst it continued undischarged, for no suitor [\*547] \*could be permitted to question any order so long as it stood, and the defendant, therefore, ought to have applied to get rid of the attachment. [1] At the same time, Mr. *Wakefield's* motion could hardly be granted in the present state of the case, for the attachment had now been discharged, and, as notice of a motion to rescind the order discharging the attachment had been given, it would be better that that motion should be discussed, together with the present.

Nov. 26.—Mr. *Wakefield* and Mr. *Steere* now moved to discharge the orders of the Master of the Rolls of the 16th and 21st of November, and referred again to *Stephens v. Neale*. (d)

Mr. *Richards* and Mr. *Chapman*, *contra*, contended that the exceptions were delivered in sufficient time, and that the attachment ought not to have been afterwards sealed; and they commented upon the eleventh order of 1828, (e) and the tenth order of 1833. (g)

THE LORD CHANCELLOR:—If you were right, then, under this eleventh order the defendant would have nothing to do for a week from delivering the exceptions to the bill; so that the plaintiff could not get an attachment.

That is, when the defendant was in contempt and liable to an attachment, [\*548] \*he would deliver exceptions to the bill, and then get six days time. He would wait till the day before the plaintiff was entitled to

(a) 1 Mylne & Craig, 274.

(b) 1 Madd. 550.

(c) 1 Sim. & Stu. 102.

(d) 1 Mad. 550.

(e) The eleventh order of 1828 is in the following words:—"That no order shall be made for referring any pleading or other matter depending before the court for scandal or impertinence, unless exceptions are taken in writing, and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent, nor unless such order be obtained within six days after the delivery of such exceptions.

(g) This order prescribes the length of time to be allowed for answering.

[1] A party who is in contempt, may at any time clear his contempt. *Bickford v. Skewes*, 10 Sim. 196. And may apply to the court to set aside an attachment which has been irregularly issued. *Hawkins v. Hall*, 1 Beav. 73.

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an attachment, and then deliver exceptions to the bill ; and he need not, unless he thought fit, do any thing more, as to the exceptions, for six days.

The case of *Stephens v. Neale*,<sup>(a)</sup> shows that an attachment has precedence over an order for time ; and a reference of the bill for impertinence is, in fact, an order for time. Both the order in that case and the order in this, are orders which, if the defendant is right, would prevent the plaintiff from obtaining an attachment ; and, as according to that case, the attachment would have precedence, the time of the service of the order does not appear to me very material.

I think I am bound to hold this attachment regular, not only in consequence of the decision in the case referred to, which gives the attachment precedence, but also because of the obvious consequence of holding the contrary. Eight weeks are allowed to the defendant for answering. Those eight weeks expired, in this case, on the 29th of October, and on the 7th of November an attachment against him, for contempt in not putting in his answer, was sealed, the defendant at that time having done nothing but deliver exceptions ; and the attachment must prevail, unless it could be made out that the delivery of exceptions, *per se*, has the effect of staying all proceedings on the part of the plaintiff ; but holding that would be, under the tenth order,<sup>(b)</sup> to give the defendant the means of evading compliance \*with [\*549] that order. The plaintiff would be tied up for six days, the defendant not having any intention of proceeding with the exceptions.

It appears to me that that obvious consequence would be so injurious to practice, that, independently of authority, it would be sufficient to regulate my decision.

The defendant must, before the attachment, obtain and serve the order of reference, that being the only means by which the plaintiff can ascertain, whether what the defendant has done is regular or not.

The result is, that the attachment was regular and that the party was in contempt for not answering.[2]

“His lordship doth order, that the orders made in this cause by his lordship the Master of the Rolls, dated the 7th day of November instant, the 16th day of November instant, and the 21st day of November instant, be discharged : and it is ordered, that it be referred to the master to whom the original cause is referred, to tax the plaintiffs their costs of their application to his lordship the Master of the Rolls to discharge the said order, dated the 7th day of November instant ; and it is ordered, that the said costs, when so taxed, be paid by the defendant George Pleydell Wilton to the plaintiffs.”

(a) 1 Mad. 550.

(b) The tenth order of 1833 ; which prescribes the length of time to be allowed for answering.

[2] *Dalton v. Hayter*, 1 Phillips, 515.

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1839.—Dearman v. Wych.

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[\*550]

\*DEARMAN v. WYCH.

1839 : November 25, 26.

The enrolment of a decree or order will not be stopped by an appeal, if the order for setting down the appeal is not served before the enrolment is made.

THIS was a motion to vacate an enrolment of an order, upon the ground that the enrolment had taken place between the time at which a petition of appeal against the order had been answered, and the time at which the answer had been served ; and upon the further ground that some communication had, as was alleged, taken place, before the enrolment, between the solicitors on the respective sides, which made the enrolment improper. It will be seen, from the Lord Chancellor's judgment, that it is unnecessary to state the nature of this alleged communication. No *caveat* had been entered.

Mr. *Richards* and Mr. *James Russell*, in support of the motion, cited *Robinson v. Newdick*,<sup>(a)</sup> *Stevens v. Guppy*,<sup>(b)</sup> *Richards v. Wood*,<sup>(c)</sup> and *Lorimer v. Lorimer*.<sup>(d)</sup>

Mr. *Bethell*, *contra*, said that there was no authority to show that the mere presentation of a petition of appeal had the effect of preventing the enrolment of the order, and that no suggestion to that effect was to be found in any of the cases cited, or in the recent cases of *Barnes v. Wilson*,<sup>(e)</sup> *Balguy v.*

*Chorley*,<sup>(g)</sup> and *Wardle v. Carter*.<sup>(h)</sup>

[\*551] \*Mr. *James Russell*, in reply.

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Nov. 26.—THE LORD CHANCELLOR:—I have looked into the cases which were cited yesterday on the argument of this case. I stated yesterday that my opinion was, that what had taken place between the parties was of no consequence at all, with reference to the decision of this case ; and the only question, therefore, is, whether there was any irregularity in the enrolment.

Now, the enrolment was completed on the 15th of August : the petition of appeal had been presented and answered on the 10th, and the appeal set down on the 11th, but there was no service of the order until the 17th of August. It stands, therefore, that the enrolment was completed between the time when the appeal was set down, and the time when the order for setting it down was served. I certainly throw out of consideration the statements of the affidavits as to notice ; for, in the first place, the notice would not affect the question at all, unless the dealing between the parties had been such as to make it unfair for the plaintiff to take the steps which he did ; and, further, the statement of what took place is entirely denied. Therefore I throw that entirely out of consideration.

Now, it is very obvious that if the course of practice were, that the presentation of a petition of appeal would affect the validity of the enrolment, the

(a) 3 Mer. 13.

(b) Turn. &amp; Russ. 178.

(c) 2 Mylne &amp; Keen, 621.

(d) 1 J. &amp; W. 284.

(e) 1 Russ. &amp; Mylne, 486.

(g) 1 Mylne &amp; Keen, 640.

(h) 1 Mylne &amp; Craig, 283.

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 1839.—Dearman v. Wych.
 

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party enrolling would never know whether his enrolment were good or bad, because every thing, with reference to the appeal, before service of the order, takes place behind his back; and that is entirely obvious, if we consider what the \*form and nature of an appeal is. The petition of ap- [\*552] peal is only an application for leave to appeal; and although it is of course that that application should be granted, it is an application to the discretion of the court, and it is only a conditional assent that the court gives. It grants the permission to appeal upon certain terms. After, therefore, the order is obtained, it is entirely in the option of the party obtaining the order whether he shall comply with the terms. All that is left entirely in his own breast, until he has complied with the terms, and has, by service of the order, brought the other parties before the court of appeal.

It follows, therefore, that the enrolment should stand good; and so, in the cases referred to, although the question does not seem to have been distinctly raised, it seems to have been assumed.

In *Stevens v. Guppy*, for instance, the petition of appeal was presented on the 6th of December, and the order upon that petition was made on the 7th of December, but not served until the 12th, while the enrolment had taken place on the 10th.

The court decided that the enrolment should not stand good; not because the petition of appeal had been presented and answered before the enrolment had taken place; for, if that had been the case, it would have prevented the question, which was decided, from arising at all; but the question turned upon this, whether the enrolment should be vacated because conversations had taken place, which, in the opinion of the court, made it unjust that the enrolment should stand.

It is obvious that if the presentation of the petition of appeal had been sufficient, it was quite unnecessary \*to consider the effect of [\*553] those conversations; because the appellant would have done that which would have made the enrolment irregular. But the court held the enrolment bad, on account of the conversations which had taken place between the parties; and that I have always understood to be the rule between the parties.

Whether the circumstance of a *caveat* being entered makes any difference or not, is a question not now before me; because, in this case, the only point I have to decide is, whether the enrolment, taking place before the service of the order setting down the appeal, is to stand good, or to be vacated for irregularity.

I am of opinion that the enrolment is good, and that the case I have mentioned assumed that, under similar circumstances, it would be good.

This motion must be refused; but I cannot give the costs; because there were expressions in the cases of *Stevens v. Guppy* and *Richards v. Wood*

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which may have induced the party to come here ;[1] but I think I must give the respondents the costs of those affidavits as to what passed between the parties.

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[\*554] \**Between* HELENA WELLESLEY, Wife of the Defendant The Honorable WILLIAM POLE TYLNEY LONG WELLESLEY, by HENRY HARRISON, her next Friend, Plaintiff; *and* the said WILLIAM POLE TYLNEY LONG WELLESLEY, JOHN WRIGHT, The Reverend JOHN GREENLY, WILLIAM RICHARD ARTHUR POLE TYLNEY LONG WELLESLEY, THOMAS PATERSON, WILLIAM LAWRENCE BICKNELL, JAMES ARCHIBALD CASAMAJOR, and WILLIAM HART, Defendants.

1839: November 20, 22, 23.

A demurrer to a bill having been put in, on two grounds, viz. want of equity and want of parties, the judge was of opinion that it was good, as a demurrer for want of parties, though not as a demurrer for want of equity. An order was therefore made, which allowed the demurrer, but gave leave to amend. The bill was amended accordingly.

The defendants, who had demurred, afterwards presented a petition of appeal to the Lord Chancellor against this order ; but before the appeal was heard, they demurred to the amended bill. Under these circumstances, the Lord Chancellor dismissed the appeal with costs.

Observations upon the form of drawing up an order upon demurrer, in a case where the court is of opinion that one of two grounds of demurrer is good, and the other bad.

In this case, two of the defendants, viz., John Wright and John Greenly, demurred to the original bill, and assigned, upon the record, two causes of demurrer, viz., first, want of equity, and secondly, want of parties. Upon the 24th of July, 1839, the Vice-Chancellor made an order, upon the argument of the demurrer, which was afterwards drawn up in the following form, viz., The court held the demurrer, so far as it was a demurrer for want of equity, to be insufficient ; and did, therefore, order that the same should be overruled ; and the court held the demurrer, so far as it was a demurrer for want of parties to be good and sufficient ;

[\*555] \*and did, therefore order that the same should stand and be allowed ; and, after ordering that the plaintiff should pay to the demurring defendants their costs of the demurrer, it was ordered that the plaintiff should have leave to amend her bill, by adding proper parties thereto, with apt words to charge them, and otherwise as she should be advised.

In pursuance of the leave to amend so given, the plaintiff amended her bill in the month of August, 1839, but did not add any new defendants : and, on the 11th of September, the defendants Wright and Greenly put in a demurrer to the amended bill, assigning, as causes of demurrer, want of equity and want of parties. On the 3d of September, however, the same defendants had

[1] Ante, 448, 449.



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1839.—Wellesley v. Wellesley.

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presented to the Lord Chancellor a petition of appeal from the Vice-Chancellor's order of the 24th of July, which complained of so much of the order as ordered that the demurrer, so far as it was a demurrer for want of equity, should be overruled, and as gave liberty to the plaintiff to amend her bill, and prayed that so much of the order as last mentioned might be reversed or discharged; and that the demurrer, so far as it was a demurrer for want of equity, might be allowed: and that the plaintiff's bill might be dismissed, with costs, as against the appellants.

The appeal now came on to be heard.

Mr. *Wigram* and Mr. *Toller* appeared in support of the appeal and argued the case on behalf of the appellants.

On the 22d of November, when the plaintiff's counsel (Mr. *Jacob*, Mr. *Richards*, and Mr. *Willcock*) were about to support the Vice-Chancellor's decision,

\*THE LORD CHANCELLOR said; Mr. *Wigram*—before Mr. *Ja-* [\*556]  
*cob* goes on—this order appears to me to have been drawn up in a very irregular form. There can be no such thing as allowing a demurrer and overruling it in the same proceeding. The demurrer is allowed just as much for want of parties as it would have been for want of equity. The present form of the order may, however, have been adopted for the purpose of giving the leave to amend. It is very important that it should be kept in view that there is but one demurrer; whereas, it would appear, by the form of the order, that there had been two demurrers. The demurrer was allowed, in the result; but the Vice-Chancellor gave leave to amend, and the amended bill is actually on the file. The only question is, whether or not the plaintiff should have had leave to amend.

Mr. *Wigram* said that the plaintiff had amended the bill before it was possible that the defendants could appeal from the Vice-Chancellor's order giving her leave to amend.

THE LORD CHANCELLOR:—An application might have been made to stay the amendment, until the appeal should have been disposed of. I very much doubt whether, after leave to amend has been given, and the amendment has actually been made, and the defendants have pleaded to the amended bill—no application having been made to stay the amendment pending an appeal—it is proper that I should now entertain the question of the propriety of the leave to amend. I think you should have applied to me, either to hear the appeal at once, or to stay the execution of the order giving leave to amend.

\*Mr. *Jacob* and Mr. *Willcock* urged that, as the demurrer was al- [557]  
lowed, with costs, the only question really involved in the present appeal, brought after the amended bill had been actually filed, was, whether the defendants should be paid for the first office copy of the bill; and that it was quite immaterial to the defendants whether the bill now upon the file was considered as an entirely new, and therefore original, bill, or as an amended

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 1839.—*Wellesley v. Wellesley*.
 

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bill ; inasmuch as a bill amended, by leave, after demurrer allowed, was, for the purpose of answering, considered an original bill. They also said that in consequence of the defendants not having made an application to the court such as the Lord Chancellor had suggested, the plaintiff had been obliged to amend within the short time given by the order allowing the demurrer. They further stated that numerous defendants to the original bill had not demurred to it, and were still before the court.

Mr. *Wigram*, on the other hand, said that the question whether leave to amend ought to have been granted was a question of most substantial importance ; for it depended upon another question, namely, whether the bill ought to have been allowed for want of equity, a question which turned upon the construction of two deeds stated in the bill ; and that if his lordship were of opinion that the demurrer ought to have been allowed for want of equity, there would be an end of the litigation altogether ; for the plaintiff would file no new bill after his lordship's opinion to that effect should have been given.

THE LORD CHANCELLOR :—The court never gives an opinion, except as it is necessary to found some order ;[1] and the only question [\*558] \*before me is, whether I shall amend the Vice-Chancellor's order, by striking out the liberty to amend the bill which it gives. It appears to me, that, however unfortunate it may be, the parties have not taken the right course to obtain the judgment of the court upon that question. The order was, certainly, drawn up in a very irregular form ; and care must be taken that no orders are drawn up in that form in future. There was one demurrer, which assigned two causes of demurrer ; one was the want of equity stated in the bill, and the other was want of proper parties. The Vice-Chancellor, in substance, though not in form, gives leave to amend, which he might have done if he had given no opinion upon the general demurrer. It is not usual, upon allowing a general demurrer, to give leave to amend ; but it may be done.[2] It is in the discretion of the court so to do. In all

[1] *Vernon v. Vernon*, cited *infra*, 560. In a case upon exceptions to a master's report, Lord Langdale, M. R., said : " I think it right to say, that if I had been aware of the nature of this report before this matter was discussed, I should have declined to hear the arguments. The parties have agreed for the purpose of argument, but not for any other purpose, to admit certain facts, and reserved the right to adduce evidence on them. An adjudication might have been made by the court, which would have proved quite fruitless ; for a reference must afterwards have become necessary to inquire into the truth of the very facts, on which the judgment of the court was founded. The court has not time to indulge in the discussion of imaginary cases, and if I had been aware of it, I would not have heard this case on such partial admissions." *Sidebotham v. Barrington*, 3 Beav. 529. So, in *Fletcher v. Peck*, 6 Cranch, 147, Johnson, J. said : " I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confidence however in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court."

[2] *The Attorney General v. The Corporation of Poole*, ante, 33. *Vernon v. Vernon*, 2 Myl. Cr. 172. *Lidbetter v. Long*, ante, 286.

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1839.—Wellesley v. Wellesley.

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those orders of discretion, the court of appeal considers, whether, under all the circumstances of the case, it is expedient to alter an order which the other branch of the court has made. Now, in this case, I find that the order having been made on the 24th of July, by which the leave to amend had been granted, the other party did not come to this branch of the court to apply to have the demurrer immediately argued upon appeal, or to have an order made that the parties should remain as they were until it could be disposed of. The plaintiff amends, and the defendants demur to the amended bill, but, afterwards, ask that the order giving leave to amend may be reversed. The only effect of doing that would be to take off the file that bill which has been amended, involving the plaintiff in considerable difficulty as to the other parties, and making her file a new bill, which she could do only by dismissing this bill against all the other parties. Considering what has taken place, I think it would be a very unsound exercise of my jurisdiction if I were now to interfere with the Vice-Chancellor's discretion in giving [\*559] leave to amend. If the parties wish to take my opinion upon the merits, there will be an opportunity of so doing in the subsequent stages of the cause.

THE LORD CHANCELLOR postponed, till the following day, his decision with respect to the costs of the appeal.

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Nov. 23.—On the next day the LORD CHANCELLOR said: I find, in this case, an exercise of the discretion of the Vice-Chancellor, upon which the parties have acted; and it is impossible to place the parties in the same condition in which they were before those proceedings took place. Whether, therefore, I agreed with the Vice-Chancellor in the discretion which he exercised or not, I certainly should not, under such circumstances, have interfered where the order was founded, not upon any strict rule of practice, but upon the discretion of the court.

With respect to the costs I had a strong recollection of having a former case of a similar kind before me; and I find that *Vernon v. Vernon*,<sup>(a)</sup> was such a case. The position of the parties there, however, was inverted, and they were not exactly in the same situation as here. The Master of the Rolls had allowed a demurrer, and the plaintiff admitted that the demurrer must have been allowed for want of parties, and I said; "The case came before the Master of the Rolls upon two grounds of demurrer; first for want of equity; secondly for defect of parties. The Master of the Rolls, being of opinion that the demurrer for want of equity was good, did not enter into the consideration of the demurrer for want of parties. But it is admitted, by the plaintiff's counsel, that the demurrer for want of parties is tenable; and, therefore for what purpose this appeal is brought, I cannot understand; because if the plaintiff can go on without filing a new bill, he must necessarily amend his present bill, and come before the court

(a) 2 Mylne & Craig, 145.

1839. — *Wellesley v. Wellesley*.

upon a different record. And the question upon which all this expense and litigation is incurred, and all this time has been consumed, is simply, whether the plaintiff shall file a new bill, or amend that which is already on record ;” and then, Mr. Wigram having said that the object of the parties was to obtain an opinion upon the merits, I added : “ I do not mean to give the parties the benefit of any opinion upon the merits. The court is bound to decide upon that which comes regularly before it. The sole question is whether the plaintiff is to amend his bill, or to file a new bill. The expense and loss of time which this appeal has cost would not have been unnecessarily incurred, if the real merits of the case had been under discussion ; but they have been very unnecessarily incurred upon such a question as that which alone is now before the court.”(a)

Being of that opinion in *Vernon v. Vernon*, it is impossible that I should come to any other conclusion in a case in which the parties have acted on the discretionary authority given by the judge. I think, therefore, that this is a practice which ought not to be encouraged, inasmuch as it is an appeal from a discretion ; and the appeal must be dismissed with costs.[3]

[\*561]

\*WELLESLEY v. WELLESLEY.

1839 : November 27, 28, 30.

*Semble*, that if a person covenants that he will, on or before a certain day, secure an annuity, by a charge upon freehold estates or by investment in the funds, or by the best means in his power, such covenant will create a lien upon any property to which he becomes entitled between the date of the covenant and the day so limited for its performance.

THE demurrer of the trustees, John Wright and John Greenly, to the amended bill referred to in a former page, now came on to be argued before the Lord Chancellor.

The case stated by the bill was, in substance, as follows :

That, in the month of June, 1834, the plaintiff and her husband, the defendant, W. P. T. L. Wellesley, having agreed to separate, articles of separation, dated the 21st of June, 1834, were prepared, in two parts, one of which parts was executed under the hand and seal of the defendant W. P. T. L. Wellesley, and the other under the hands and seals of the plaintiff and the defendant Colonel Paterson, who was her father ; and that such articles were expressed in the following words :—

“ Articles of agreement entered into the 21st day of June, 1834, between

(a) See pages 167, 168.

[3] That an appeal does not in general lie from a mere matter of discretion, see further, *Brockett v. Brockett*, 2 Howard, 240 ; *Rogers v. Hosack's Exrs.* 18 Wend. 319. “ I understand the line of authority to stand almost without exception, that to warrant a reversal upon an appeal from chancery, some definite rule of law or equity must appear to have been violated.” Cowen, J. in last cited case, p. 330.

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the Hon. William Pole Tylney Long Wellesley, now residing at Brussels, in the kingdom of Belgium, of the first part, Helena Wellesley, wife of the said William Pole Tylney Long Wellesley, of the second part, and Colonel Thomas Paterson, now residing at Calais, in the kingdom of France, of the third part. Whereas in consequence of differences which have arisen and do subsist between the said William Pole Tylney Long Wellesley, and Helena his wife, they have agreed to live separate and apart from each other: Now, these presents witness, that for the purpose of making \*an annual provision for the said Helena Wellesley, from the 14th [\*562] day of November last past, (all debts contracted by her to the said 14th day of November having been paid by the said W. P. T. L. Wellesley,) and in consideration of the covenant hereinafter contained on the part of the said Thomas Paterson, he the said W. P. T. L. Wellesley doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said Thomas Paterson, his executors and administrators, that he the said W. P. T. L. Wellesley shall and will pay, or cause to be paid to William Lawrence Bicknell, of Lincoln's Inn Square, the solicitor of the said Helena Wellesley, the sum of 1000*l.*; that is to say, 500*l.* part thereof, on or before the 1st day of July next, and the further sum of 250*l.*, on the 1st day of September next, and the further sum of 250*l.*, residue of the said sum of 1000*l.*, on or before the 14th day of November next, such several sums of money to be paid by the said William Lawrence Bicknell to the said Helena Wellesley, for the sole and separate use and benefit of the said Helena Wellesley; and that the receipts of the said Helena Wellesley, or of such person or persons as she shall or may appoint to receive the same, shall, notwithstanding the coverture of the said Helena Wellesley, be effectual discharges for the money in such receipts expressed to be received. And these presents also witness, that for the purpose of making a provision for the said Helena Wellesley, from and after the said 14th day of November, 1834, and during the then remainder of her life, and in consideration of the covenant hereinafter agreed to be entered into by the said Thomas Paterson, he the said W. P. T. L. Wellesley doth hereby for himself, his heirs, executors, and administrators, further covenant and agree with the said Thomas Paterson, his executors and administrators, that he the said W. P. T. L. Wellesley shall and will, on \*or before the 1st day of February, 1835, well and [\*563] effectually, *either by a charge on freehold estates of inheritance to be situate in England or Wales, or by an investment of an adequate sum of money in some of the stocks or funds of Great Britain, or by the best means which may then be in his power,* secure the payment to the said Thomas Paterson, his executors or administrators, during the life of the said Helena Wellesley, of an annuity of 1000*l.* of lawful money of Great Britain, in equal quarterly portions, on the 14th day of February, the 14th day of May, the 14th day of August, and the 14th day November in every year; the first quarterly payment of the said annuity to be paid on the 14th day of



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November, 1834. And it is hereby agreed that the said Thomas Paterson, his executors or administrators, shall stand possessed of or interested in the said annuity, in trust for the said Helena Wellesley, for her sole and separate use and benefit; but not to be subject to any sale, charge, mortgage, or other disposition, by the said Helena Wellesley, by way of anticipation. And it is hereby further agreed, that the receipts of the said Thomas Paterson, his executors or administrators, for the said annuity, or any quarterly portion or other part thereof, shall effectually discharge the person or persons paying the same, for the sum in such receipts expressed to be received, and from being answerable for the misapplication, or from being bound to see to the application thereof. And it is hereby further agreed, that upon the said annuity of 1000*l.* being so secured as aforesaid, such deeds shall be executed, by all necessary parties, for carrying into effect this agreement, and the intention of the parties expressed in these presents, with such covenants and agreements on the part of the said W. P. T. L. Wellesley, for permitting the said Helena Wellesley, to live separate and apart from him, as if she were a feme sole and unmarried; and with such covenants, on the part

[\*564] of the said Thomas Paterson, or (in case of his death in the meantime) of some other responsible person, for indemnifying him the said W. P. T. L. Wellesley, against all debts contracted by the said Helena Wellesley, after the said annuity shall be so secured as aforesaid, and during the then remainder of her life, and from all costs, damages, expenses, actions, suits, claims, and demands, which the said W. P. T. L. Wellesley shall or may sustain, or incur, or become subject or liable to, on account of the maintenance, support, lodging, and wearing apparel of the said Helena Wellesley, or otherwise on her account, from and after the day of the date hereof, and during the then remainder of her life; and with such other usual covenants and provisoes, as the respective counsel of them the said W. P. T. L. Wellesley and Helena Wellesley his wife shall advise and require. And these presents further witness, that in consideration of the premises, he the said Thomas Paterson doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said W. P. T. L. Wellesley, his executors and administrators, in manner following, that is to say, that if the said sum of 1000*l.* shall be paid by the said W. P. T. L. Wellesley, in pursuance of the covenant or agreement for that purpose hereinbefore contained, then and in such case, he the said W. P. T. L. Wellesley shall not be liable or obliged to pay any debt or debts contracted by the said Helena Wellesley since the 26th of April last, or for the maintenance, support, lodging, wearing apparel, or other expenses of the said Helena Wellesley from the day of the date hereof, to the said 14th day of November, 1834, or to pay any debt or debts which shall be contracted by the said Helena Wellesley, at any time or times after the date of this agreement, and prior to the said 14th day of November, 1834; and that the said Thomas Paterson, his heirs, ex-

[\*565] ecutors, or administrators, shall and will at all times hereafter keep



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indemnified the said W. P. T. L. Wellesley, his heirs, executors, and administrators, and his and their estates and effects, against all such debts as shall or may be so contracted as aforesaid ; and also against all costs, charges, damages, expenses, actions, suits, claims, and demands which the said W. P. T. L. Wellesley, his heirs, executors, or administrators, or his, or their estates or effects, shall or may pay, sustain, incur, or become subject or liable to, for or by reason or on account of the maintenance, support, lodging, clothing, or other expenses, of the said Helena Wellesley during such time as aforesaid, or for or by reason or on account of any such debt or debts as have been, or shall or may be so contracted as aforesaid, or for or by reason, or on account of any act, deed, matter, or thing, in anywise relating thereto, except such costs, charges, damages, expenses, actions, suits, claims, and demands, as may be occasioned by or through the neglect or default of the said W. P. T. L. Wellesley ; and further that if the said sum of 1000*l.* shall be so paid by the said W. P. T. L. Wellesley as aforesaid, the said Helena Wellesley, or any person or persons on her behalf shall not, nor will, at any time or times hereafter, commence or prosecute any suit or suits in any court or courts whatsoever, for compelling restitution of conjugal rights, or obliging the said W. P. T. L. Wellesley to allow her any future support, maintenance or alimony (during such time as aforesaid,) over and above the said sum of 1000*l.*” :

That by a disentailing deed, of the 13th of December, 1834, certain freehold hereditaments, situate in the counties of Essex, Southampton, and Hertford, of which, subject to certain large incumbrances, Mr. Wellesley was tenant for life, with remainder to his eldest son in tail, were conveyed, by the father and son, to such uses as \*they should jointly, within [\*566] three calendar months, in manner therein mentioned, appoint, with remainder to the use of the defendants, Wright and Greenly, in fee, upon certain trusts declared by another indenture, being the deed of the 15th of December, 1834, next mentioned : and that by a deed of the 15th of December, 1834, the father and son, in exercise of the power, appointed the hereditaments to the defendants, Wright and Greenly, in fee, upon trust to raise, by mortgage or sale, the sum of 462,000*l.*, of which they were to stand possessed, upon trust, after payment of costs, to redeem certain annuities, and then to pay certain judgment debts due from the father, and then to pay certain charges upon the estates comprised in the deed, and certain charges upon estates in Ireland, and in Yorkshire and Wiltshire, and then to pay the residue for such purposes as Mr. Wellesley should, by deed or instrument in writing, appoint, and in default of and subject to any such appointment, to pay the same to Mr. Wellesley, his executors, administrators, or assigns, for his or their own absolute use and benefit ; and that it was declared that if the trustees should, at any time previously to the complete execution of the trusts, have ascertained or been satisfied that there would eventually be an ultimate surplus or residue of the 462,000*l.*, which would be applicable ac-

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according to the appointment, or for the benefit of Mr. Wellesley, then it should be lawful for them to pay, advance, and apply so much of the 462,000*l.* as should, for the time being, be ascertained to be the amount of such ultimate surplus or residue, or any part thereof, in such manner, according to the direction or appointment, or for the benefit of Mr. Wellesley, as thereinbefore was directed, concerning such ultimate surplus or residue, notwithstanding that the prior trusts should not have been performed; and that, subject to

the trusts before mentioned, the trustees should stand seised of the  
 [\*567] \*estates, upon trust, out of the rents, to pay, during the life of Mr.

Wellesley, the premiums upon policies of assurance upon his life for 87,000*l.*, and, subject thereto, to pay to Mr. Wellesley's son, during the joint lives of his father and himself, an annuity of 160*l.* per annum, and after Lord Maryborough's death, a further annuity of 6000*l.* per annum, in addition to the annuity of 190*l.*; and that, subject thereto, the trustees should stand seised of the estates, upon such trusts as Mr. Wellesley and his son should jointly appoint, and in default of and subject to such joint appointment, should pay the rents to Mr. Wellesley for his life, and after his death should stand seised of the estates in trust for his son, in fee simple, if he should survive him, but if the son should die in his lifetime, then in trust for the son in tail male, with remainder to Mr. Wellesley in fee:

That it was by the same deed declared, that it should be lawful for Mr. Wellesley, at any time or times during his life, by deed or will, but subject and without prejudice to the trust for raising the 462,000*l.*, and subject also to the trusts for paying the premiums of the policies for the sum of 87,000*l.* and the annuities of 160*l.* and 6000*l.*, to limit or appoint unto or to the use of or in trust for his then present wife, or for any woman or women whom he should, after the decease of his then present wife, marry, a jointure not exceeding 1500*l.* per annum, to be charged upon the estates comprised in the deed now in the course of being stated, with powers of distress and entry, and a term of years for better securing such jointure.

'That by the same deed, Mr. Wellesley and his son released certain leaseholds for lives, and covenanted to surrender certain copyholds, to the trustees, upon trusts to correspond with those before declared of the freeholds:

[\*568] \*That the particulars of the freehold hereditaments conveyed by the indentures of the 13th and 15th of December, 1834, were set forth in the schedules to the indenture of the 15th of December, 1824, together with the quantities and annual values thereof; and that the freehold hereditaments in the counties of Essex, Southampton, and Hertford were, in fact, and were in the schedules to the last-mentioned indenture stated as being, of the annual value of 20,018*l.* 8*s.* 2*d.* and 3139*l.* 18*s.* 6*d.*, making together 23,158*l.* 6*s.* 8*d.*, and that the leasehold hereditaments comprised in the indenture of the 15th of December, 1834, were of considerable annual value; and

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that there was standing on the hereditaments a very great quantity of valuable timber :

That Mr. Wellesley had, on the 1st of February, 1835, and still had, power well and effectually to charge the annuity of 1000*l.* upon the interest secured to him in the surplus of the before mentioned sum of 462,000*l.*, and also upon a certain charge of 31,731*l.* 5*s.* agreed, by the indenture of the 15th of December, 1834, to be kept up for his benefit, and upon the estate limited to him in the lands comprised in that indenture, and by exercise of the power reserved by that indenture of appointing and creating a yearly rent charge of 1500*l.* in favor of the plaintiff.

The bill charged that the plaintiff was entitled to have the annuity effectually charged by the best means which were, on the 1st of February, 1835, or had since been, in the power of Mr. Wellesley, at the election of the plaintiff; and that Mr. Wellesley then had, and still had, in his power, the means of charging the annuity on freehold estates of inheritance in England, in manner before mentioned; but that he had not, on the 21st of June, 1834, or at any time since, or now, any other \*freehold estates or es- [\*569] tate, or power to charge any other estate in England or Wales or elsewhere, or any stock or funds of Great Britain, or power to charge any stock or funds of Great Britain, or any other means whatsoever to secure payment of the said annuity of 1000*l.*, or any part thereof: and the bill then charged that the arrangement effectuated by the indentures of the 13th and 15th of December, 1834, was entered into by Mr. Wellesley for the purpose of providing for him the means of securing the annuity of 1000*l.* for the plaintiff, and in part performance of the agreement of the 21st of June, 1834.

The bill then stated, that of the before mentioned sum of 462,000*l.*, the sum of 260,000*l.* had been raised and duly applied towards the redemption of the annuities and discharge of the debts and liabilities mentioned in the indenture of the 15th of December, 1834, and that Mr. Wellesley and his son, and the trustees Wright and Greenly, confederating together, instead of raising so much of the residue of that sum as was necessary for the purpose of redeeming and satisfying the residue of the before mentioned annuities, debts, and liabilities, and securing the plaintiff's annuity, had already raised some considerable sums of money, and were about raising other considerable sums of money, upon the security of the charge of 462,000*l.*, and of Mr. Wellesley's interest in the lands and hereditaments and in certain charges before mentioned, and had paid and applied the sums so raised to or for, or permitted the same to be received by, Mr. Wellesley, and threatened and intended to pay or apply the sums so to be raised, to or for, or to permit the same to be received by, Mr. Wellesley; but that the plaintiff had been prevented, by the secrecy of such proceedings, from ascertaining, and had been unable to ascertain, and was ignorant of the \*names or name of the persons, [\*570] or any person by or on account of whom such sums of money, or any of such sums of money as had been already raised, had been advanced,

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or such sums of money, or any of such sums of money as were about to be raised, were about to be advanced; and that Wright and Greenly had paid or applied, to or for, or permitted Mr. Wellesley to receive, the rents and profits of the lands in England, in derogation of the plaintiff's rights:

That Mr. Wellesley had paid Mr. Bicknell the sum of 850*l.* only in part of the sum of 1000*l.* which he had contracted to pay to him on or before the 14th of November, 1834, for the plaintiff's use, and that the annuity of 1000*l.* was wholly in arrear from that day:

That Mr. Wellesley sometimes pretended that he was not bound specifically to perform the articles of separation, alleging that Colonel Paterson was not a person of sufficient substance to indemnify him, according to the covenants contained in the articles; but that Mr. Wellesley's solicitors had represented to the plaintiff's solicitors that Mr. Wellesley would specifically perform the contract contained in the articles of separation, if two responsible persons became trustees of the plaintiff's annuity in the stead of the defendant Colonel Paterson, and if they entered into the covenants into which it was agreed by the articles that Colonel Paterson should enter; and that, accordingly, the plaintiff had prevailed upon the defendants Casamajor and Hart to become such trustees, and to enter into such covenants; and that they were fully responsible persons; and that Colonel Paterson was willing to retire, and that Mr. Wellesley's solicitors had approved of the defendants Casamajor and

Hart as trustees in Colonel Paterson's stead, and had written a letter [\*571] to that effect, dated the 1st of February, 1839, (which was set out in the bill,) and by which they promised to prepare the necessary deed for the purpose, but that Mr. Wellesley had neglected and refused to pay the arrears of the annuity, and to execute such charge as contracted for by the articles of separation:

That the plaintiff had lately discovered that Mr. Wellesley was, through the agency of his solicitors, and with the concurrence of Wright and Greenly, upon the point of completing a further mortgage, charge, or security, for a considerable sum of money, on the interests reserved to him by the indenture of the 15th of December, 1834; and that it was arranged and intended, that the money so to be raised should be immediately transmitted to him in Belgium; but that the plaintiff had been prevented from discovering, and had been unable to discover, and was ignorant of, the names or name of the persons or person about to advance the same or any part thereof; and that the trustees, Wright and Greenly, had lately remitted, or authorized or permitted Mr. Wellesley's solicitors to remit, to Mr. Wellesley, and intended to continue to remit, or to authorize and permit the solicitors to remit, to him, considerable sums of money arising from the rents, issues, and profits of, and otherwise from or upon the security of, the premises comprised in the indenture of the 15th of December, 1834.

The bill prayed that Mr. Wellesley might be decreed to pay to Mr. Bicknell, for the plaintiff's use, the sum of 150*l.*, residue of the 1000*l.* agreed to be paid before the 14th of November, 1834; and that he might be decreed

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specifically to perform the articles of agreement on his part, the plaintiff being ready and willing, and thereby offering, and the defendant Paterson, or, if \*required by Mr. Wellesley, the defendants, Casamajor and Hart, [\*572] being ready and willing, specifically to perform the articles on their part; and that Mr. Wellesley might be decreed to effectually charge the annuity of 1000*l.* upon the interest reserved to him in the surplus of the before mentioned sum of 462,000*l.*, charged upon the before mentioned estates, and upon the charge of 31,731*l.* 5*s.* agreed to be kept up for his benefit, and upon the estate limited to him in the lands comprised in the indenture of the 15th of December, 1834, and to effectuate such charge, by the exercise, to a sufficient extent, of the power reserved to him by that indenture of appointing and creating a yearly rent charge of 1500*l.* in favor of the plaintiff: and that, if necessary, for the purpose of effectually charging the annuity of 1000*l.* upon freehold estates of inheritance in England or Wales, the debts and liabilities of Mr. Wellesley, and the charge of 462,000*l.* might, as between him and the plaintiff and as between the plaintiff and Mr. Wellesley's son, to the extent of any charge to be created by exercise of the last mentioned power of appointment, be marshalled against and upon the lands in Ireland, and a charge of 100,000*l.* upon the same which was mentioned in the bill; and against and upon the copyhold and leasehold estates, or some of them, so as to release the freehold estates in England from such debts, liabilities, and charges, to the extent necessary for effectually securing the annuity of 1000*l.* to the plaintiff; and that, if necessary for the purpose of securing the annuity of 1000*l.*, a sufficient part of what should remain of the sum of 462,000*l.* in the hands of Wright and Greenly, after payment and discharge of the incumbrances upon the lands and charges comprised in the indenture of the 15th of December, 1834, might be invested in the purchase either of freehold estates of inheritance in England or Wales, or of a competent amount \*of some stock or [\*573] funds of Great Britain, for effectually securing the annuity of 1000*l.* to the plaintiff: and that Mr. Wellesley might be decreed to pay to the plaintiff the arrears of her annuity; and that they might be raised out of his interest before mentioned; and that Mr. Wellesley might be restrained from making further incumbrances; and that Wright and Greenly might be restrained from remitting or paying to him, or permitting him to receive, any money which had arisen or might arise by or from the rents, issues, and profits of the hereditaments before mentioned, or from any estate, right or interest whatsoever secured to or provided for Mr. Wellesley by or under the indenture of the 15th of December, 1834; and that, if necessary, a receiver might be appointed to get in without prejudice to the prior incumbrances, all sums of money which had arisen or might arise from the rents of the before mentioned hereditaments, and from any securities or security already effectuated upon the same.

Mr. *Wigram* and Mr. *Toller*, in support of the demurrer, contended that the covenant in the articles of separation was a mere personal covenant on



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Mr. Wellesley's part, and did not create any lien upon any particular property, still less any lien upon the money which he might, by some subsequent arrangement, become entitled to have raised for his use; and that there was no statement in the bill to show that the covenant might not be well performed by Mr. Wellesley, in some other way than by charging his interest in the 462,000*l.* with the sum which he had covenanted to secure; and that the present bill was an attempt to deprive him of that option with respect to the mode of performing his covenant, which the covenant itself gave him; and that the plaintiff's right to sustain such a bill as the present was not [\*574] at all stronger than the right which a creditor, with the security only of a personal covenant to pay, would have to prevent the debtor from selling his lands. They also said, that the cases which would be referred to on the other side only showed that a contractor's representatives (not the contractor himself) were bound, in the manner in which it was here sought to have it declared that the contractor himself was bound. They cited *Fremoult v. Dedire*,<sup>(a)</sup> *Williams v. Lucas*,<sup>(b)</sup> *Gardner v. The Marquis of Townshend*,<sup>(c)</sup> *Ravenshaw v. Hollier*,<sup>(d)</sup> *Deacon v. Smith*,<sup>(e)</sup> Sugden's Vendors and Purchasers,<sup>(g)</sup> *Berrington v. Evans*,<sup>(h)</sup> and *Acton v. Woodgate*.<sup>(i)</sup> They also contended that the plaintiff could not realize her asserted equity, without taking the accounts of the various sums payable out of the money to be raised; and that she could not take the accounts without having all the parties interested in those sums before the court.

Mr. Jacob, Mr. Richards, and Mr. Willcock, in support of the bill, contended that if a covenantor had an option as to which of two funds he would settle, the consequence was that, until he exercised that option by settling one of them, both were liable; and that if it was made to appear to the court that he intended to part with both without performing his covenant, there could be no doubt that the court would interfere, by injunction, to prevent his so doing. They referred to *Prebble v. Boghurst*,<sup>(k)</sup> *Tooke v. Hastings*,<sup>(l)</sup> *Roundell v. Breary*,<sup>(m)</sup> *Deacon v. Smith*,<sup>(n)</sup> *In re Ship* [\*575] *Warre*,<sup>(o)</sup> *Metcalfe v. The Archbishop of York*,<sup>(p)</sup> *Lyde v. Mynn*,<sup>(q)</sup> *Burn v. Carvalho*.<sup>(r)</sup> As to the objection for want of parties they referred to *Rose v. Page*.<sup>(s)</sup>

Mr. Wigram, in reply.

Nov. 30.—THE LORD CHANCELLOR:—This is a demurrer, by two of the defendants, who are trustees of property over which Mr. Wellesley obtained a power of charge in December, 1834; and the question is, whether the bill

(a) 1 P. W. 429.

(d) 7 Sim. 3.

(h) 3 Yo. &amp; Coll. 384.

(l) 2 Vern. 97.

(o) 8 Price, 269.

(q) 1 Mylne &amp; Keen, 683.

(b) 2 Cox. 160.

(e) 3 Atk. 323.

(i) 2 Mylne &amp; Keen, 492.

(m) 2 Vern. 482.

(p) 6 Sim. 224: and 1 Mylne &amp; Craig, 547.

(r) 7 Sim. 109.

(c) Sir G. Cooper, 301.

(g) Vol. ii p. 153, 9th ed.

(k) 1 Swanst. 309.

(n) 3 Atk. 323; see p. 327.

(s) 2 Sim. 471.



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states such a case, as against them, as entitles the plaintiff, according to her own statement to a decree against them at the hearing; the defendants asserting that the plaintiff has no title as against them.

Now, the title of the plaintiff is under articles of separation, in which, for such considerations as the law considers sufficient in such cases, Mr. Wellesley contracts that he will, on or before the 1st of February, 1835, well and effectually, by a charge on freehold estates of inheritance, or by investment in the funds, or by the best means which may then be in his power, secure the annuity.

It appears that at the time at which this covenant was entered into, Mr. Wellesley was only tenant for life of certain estates. In December, 1834, an arrangement took place between him and his son, by which, according to the statement of the bill, he obtained a power of jointuring his present or any future wife, to the extent of 1500*l.* per annum, and a right to the surplus after paying certain \*charges and incumbrances, of a sum of [\*576] 462,000*l.* which was to be raised upon the estates. It states that he has been applied to and has refused to carry into effect the agreement, alleging that his refusal arises from the incapacity of the trustee, Colonel Paterson, to indemnify him against the debts of the wife; and then it states that it had been proposed, on the plaintiff's part, that two other gentlemen, who are defendants on this record, should be appointed, as trustees, in Colonel Paterson's stead; and then it states a letter from the solicitors of Mr. Wellesley in answer to that proposition, accepting the proposition, and stating that they will prepare the necessary deeds. The bill then states that the defendants, under the arrangement of 1834, were trustees of the estates; and that Mr. Wellesley has refused, and still refuses, to pay the arrears of the annuity, and to execute such charge as was contracted for by the articles; and then that the defendants, the trustees, were trustees of the sum of 462,000*l.* which was to be raised out of the estates, and to be applied in discharge of certain charges and incumbrances, and the surplus to be paid to Mr. Wellesley. There was therefore, in the event of the prior charges not being sufficient to exhaust the fund, a surplus which would come to Mr. Wellesley. The bill alleges that the trustees, instead of applying the 462,000*l.* according to the trust deed, were about to raise part of it for Mr. Wellesley, and were about to create a further charge for the benefit of Mr. Wellesley.

The statement, therefore, is of a covenant, by Mr. Wellesley in June, 1834, to secure, on or before the 1st of February then next, by a charge on freehold estates of inheritance, or by investment in the funds, or by the best means in his power, an annuity of 1000*l.*, and then of the acquisition of property in December, 1834, which would enable Mr. Wellesley to carry the covenant into effect. It states that the defendants are trustees of that property, \*and that instead of applying the money, which constituted that pro- [\*577] perty, in discharge of incumbrances, according to the arrangement

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of December, 1834, they were about to raise money and remit it to Mr. Wellesley.

The bill, therefore, states a covenant and part performance, there being now a statement in the bill that the agreement of December, 1834, had been entered into by Mr. Wellesley, for the purpose of enabling him to secure the annuity of 1000*l.*, and in part performance of the contract of June, 1834.

Therefore, there is a covenant to charge lands on a certain day ; the purchase of lands before that day, for that purpose, and in part performance, and a promise, after the lands acquired, to effect the charge, and a refusal to do so, and acts tending to defeat the security so acquired and promised to be charged.

If, at the hearing, these facts being proved, the court will have no power to make any decree, except that Mr. Wellesley do perform his contract, and no power to act upon the land, then the demurrer must be allowed ; but if the court can act upon the land, then the defendants who have demurred, and are made defendants as trustees of the land, are properly made defendants, and the demurrer must be overruled ; that is, in that case, according to the plaintiff's showing, she will have a decree against them. If there be a contract for sale, and the vendor proceeds so to deal with the property as to incapacitate himself from performing his contract, this court will act upon the property ; and legislative provisions now exist, enabling this court, in

certain cases, to exercise this jurisdiction with more effect. In *Prebble v. Boghurst*,<sup>(a)</sup> whilst it was still uncertain whether the \*agreement affected the lands in question, Lord Eldon did not doubt the jurisdiction of the court to appoint a receiver. If the plaintiff in this case should obtain a decree against Mr. Wellesley, establishing her title to have the annuity charged upon the property, of which the defendants demurring are trustees for him, can it be doubted that the court would act upon such property for the purpose of enforcing this equity ? and if so, the defendants, as trustees of it, are necessary parties for that purpose. The only ground upon which the defendants could contend, with success, that they are improperly made parties to the bill, would be to establish either that the bill must be dismissed against Mr. Wellesley, or that the decree against him can only be against him personally, and that the court would have no power to affect the property in question : which comes to this, that the court, being of opinion that Mr. Wellesley was bound to give effect to his contract, and to charge the annuity upon the property, of which the defendants are trustees for him, must confine itself to a personal decree against him for that purpose, and could not make any decree against the trustees ; but it is clear that the moment the court declares such right in the plaintiff, these defendants will, at all events, become trustees for the plaintiff to that extent.

(a) 1 Swanst. 309.

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In *Lyde v. Mynn*,<sup>(a)</sup> a husband had covenanted to charge an annuity, granted to a third person, upon all such property as, in the event of his wife's decease, he should become entitled to, by virtue of her will or otherwise; and having, under her will, acquired an annuity vested in trustees, the party with whom the covenant had been made filed a bill, and obtained a decree against the husband and his trustees, to carry this covenant into effect.

\*I have not, therefore, been able to see how it was possible—sup- [\*579] posing the plaintiff's bill to state a case for a decree against Mr. Wellesley—that these defendants could say that they were not properly made parties to this suit; and that there is such a case stated against Mr. Wellesley, cannot be disputed.

That this court will grant a specific performance of an agreement for a grant of an annuity, cannot now be questioned; and this agreement appears to me to contain within itself all that is necessary to give it legal validity: but if this court is to execute the agreement, it must do so according to the terms of it. The terms are, on a day certain, to charge the annuity on lands, or on an investment of stock, or by the best means in his power. I think it quite immaterial, for the present purpose, whether this gave to the husband an option, or whether he has other lands besides those vested in these defendants, upon which he can now charge the annuity; because the bill alleges that he refuses to charge it in any manner; and this court will not permit him, under the pretence of exercising an option, to evade the performance of his contract. In *Deacon v. Smith*,<sup>(b)</sup> there was an option; but it did not prevent the court from acting upon the one alternative. The property acquired, by the arrangement of December, 1834, must be considered as subsequently acquired property; but that contracts to charge property subsequently acquired will be enforced, is sufficiently established. *Lyde v. Mynn*, and the cases upon which that decision was founded, are conclusive upon that subject. The contract is not to purchase lands for the purposes of the agreement; but one alternative is to charge lands in February, 1835, and at that time he had a power of charging lands. It is \*the same as a contract to [\*580] charge such lands as he might have at that time; and if so, such was *Metcalf v. The Archbishop of York*,<sup>(c)</sup> and *Lyde v. Mynn*,<sup>(d)</sup> and such was *Tooke v. Hastings*, as reported in 2 Vern. 97. In *Lewis v. Madocks*,<sup>(e)</sup> a contract, upon marriage, to settle all personal estate, of which the husband might become possessed during the coverture, was enforced against an estate he had purchased, in part, with personal property so acquired.

Being, therefore, of opinion that the contract, as stated in the bill, must, upon the case stated, be enforced against Mr. Wellesley, and that to effect that object, the court will act upon the estates which he had a power of

(a) 4 Sim. 505; and 1 Mylne & Keen, 683; [S. C. Coop. Sel. Cas. 123.] (b) 3 Atk. 323.

(c) 1 Mylne & Craig, 547; S. C. 6 Sim. 224. (d) 1 Mylne & Keen, 683; S. C. 4 Sim. 505.

(e) 17 Ves. 48.

1839.—Wellesley v. Wellesley.

charging in February, 1835, and of which the defendants are trustees for him, I think that this demurrer must be overruled.

My opinion being founded upon the construction I put upon these articles of separation, that they amount to a contract to charge the annuity upon such lands as the husband had power to charge in February, 1835; and that the defendants are trustees of the property which he had at that time power so to charge; and that this court will, therefore, by its decree, if necessary, secure to the plaintiff the annuity, so contended for, out of the property so vested in the defendants, I do not think it necessary to discuss the ground upon which I am informed the Vice-Chancellor overruled this demurrer,[1] or the doctrine of the case of *Fremoult v. Dedire*,<sup>(a)</sup> where the contest was with the covenantor's creditors, upon a general covenant to settle lands of a [\*581] \*certain value, which was not enforced during the lifetime of the covenantor, except to observe that that case does not appear to be so much at variance with that of *Roundell v. Breary*,<sup>(b)</sup> as seems to have been supposed; because, in the latter case, the covenant was, on a certain day, to settle lands of a certain value, and the Lord Keeper thought it created a lien upon the land of which the covenantor was then seised; and in that respect *Roundell v. Breary* much more resembles the present; and that case is relied upon by Lord Hardwicke in *Deacon v. Smith*.<sup>(c)</sup> [2]

<sup>(a)</sup> 1 P. W. 429.<sup>(b)</sup> 2 Vern. 482.<sup>(c)</sup> 3 Atk. 323; see p. 327.

[1] See the Vice-Chancellor's decision, 10 Sim. 256, 270.

[2] In the year 1817, A. who was not then a trader, on his marriage, covenanted that all his property real and personal, as well that in possession, as what he should thereafter acquire, should stand and be charged and chargeable with a sum of £3000 for certain purposes therein mentioned. Some months after his marriage A. became a trader, and in the year 1835 was found and declared a bankrupt. It was held, on a bill filed by the wife and children, who were interested under the settlement of 1817, that the covenant to charge after acquired property created a valid charge, on all the freehold estates of A., purchased subsequently to his marriage, and should be carried specifically into execution, against the assignees of A. the bankrupt. Lord Plunkett, Ch.—“It is to be observed that this is not a covenant to purchase and settle, but merely that all the estates of which he should be seised or possessed, should be charged with the £3000. I do not therefore mean to rest my opinion in this case, on any of the decisions in which the covenant was to purchase and settle. But the case of *Metcalf v. The Archbishop of York*, (1 Myl. & Cr. 547; 6 Sim. 224,) appears to me to govern the present case. There the covenant was to charge an annuity upon any benefice to which the covenantor might thereafter be appointed. I cannot distinguish that from a covenant to charge any lands which he might thereafter acquire, and the decision there went accordingly to establish the annuity against the judgment creditors of the covenantor having notice of the plaintiff's title. The words of Lord Cottenham, as to the general effect of such covenants in binding after acquired lands are positive. He says, ‘there can be no doubt that a covenant to charge, or dispose of, or affect lands hereafter to be acquired, operates in equity upon lands so afterwards acquired, against the party creating the charge.’ If this principle be justly applied in the case of a judgment creditor, it must be at least equally applicable in the case of the assignees of a bankrupt, who stand not higher than the bankrupt himself.” *Lyster v. Burroughs*, 1 Dru. & Walsh, 149, 176. See *Shaw v. Borrer*, 2 Myl. & Cr. 559. *Spencer v. Field*, 10 Wend. 91. *Button v. Button*, 2 Beav. 256. *Hinde v. Blake*, 3 Beav. 234. *Langton v. Horton*, 1 Hare, 556.

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 1839.—*Stilwell v. Mellersh.*


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No formal judgment was given upon the question of want of parties, but the demurrer was overruled generally.

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**STILWELL v. MELLERSH.**

1839: December 16.

When an estate has been sold under a decree, and all proper parties have been ordered to join in the conveyance to be settled by the master, if a party to the suit whom the master considers a proper party to the conveyance, refuses to convey, the right course for the purchaser to take is to move, against that party, that he be ordered to convey; and not to move, against the plaintiffs, that they be ordered to procure him to convey.

By the decree made in this cause a certain estate was directed to be sold. This estate was purchased, under the decree, by one Thomas Simmonds, who afterwards procured the usual orders, *nisi* and absolute, confirming him as the best purchaser; and he subsequently paid the purchase money into court, under an order dated the 8th of August, 1838, which directed that all proper parties should join in and execute a proper conveyance and assurance of the estate to the purchaser, \*or as he should direct, such [\*582] conveyance and assurance to be settled by the master in case the parties should differ about the same. On the 19th of March, 1839, the master made his report, approving of a proper conveyance. One of the parties to the conveyance, as approved by the master, was the defendant William Mellersh the elder; but he refused to execute the deed: and the purchaser then moved, before the Vice-Chancellor, that the plaintiffs might be ordered to procure the execution of the deed of conveyance by Mellersh, and that the costs of the application might be paid by the plaintiffs, or out of the fund in court. His honor having refused this motion, with costs, the purchaser now moved, before the Lord Chancellor, that the Vice-Chancellor's order might be discharged, and that the plaintiffs might be ordered to procure, or to take the necessary measures for procuring, for the purchaser, the execution, by Mellersh, of the conveyance of the estate; or that such other order might be made as might be necessary for procuring the due execution of the conveyance by Mellersh; and that the costs of the application might be paid by the plaintiffs, or out of the fund in court.

Mr. *Wigram* and Mr. *Shebbeare*, in support of the motion that the plaintiffs might be ordered to procure Mr. Mellersh's concurrence, relied upon *Smith's Practice*, (a) in which it is stated that if the purchaser cannot obtain possession of the estate, the plaintiff, or a party in the cause, should procure the possession for him.

[THE LORD CHANCELLOR :—In a case of *possession*, there is, no doubt, an advantage in having the plaintiff to obtain it because he has the use of certain writs which do not belong to a person not a party.]

(a) Vol. ii. p. 213, 2d ed.

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1839.—*Stilwell v. Mellersh.*

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[\*583] \*Mr. *Wigram* said that no attachment could issue upon the application of a person who was not a party to the suit; and he contended that the plaintiff in the cause must be considered to be the vendor, and was bound to do, for the purchaser, all such acts as the vendor, in the case of a private sale out of court, would have been bound to do.

Mr. *Richards*, *contra*, for the plaintiffs.

Mr. *Chandless*, for a defendant.

No counsel appeared for Mellersh.

Mr. *Wigram*, in reply.

THE LORD CHANCELLOR:—I have no doubt that the court will aid the purchaser against the parties to the cause. Where all the parties are ordered to convey, it never occurred to me to be a matter of doubt that the purchaser could enforce that order against any party who refused to convey.

It appears to me that it is not rightly considered who are the vendors. The plaintiffs are not the vendors. The court takes upon itself to sell. Nobody advertises the sale as vendor. The sale is advertised to be made under the decree of the court.

I cannot conceive the necessity—when it is a simple question of conveyance—of going through the circuitry which has been adopted in the present case, for the purpose of compelling a party to convey. There may be a reason for it in some particular cases, as, for instance, when you want the assistance of the sheriff. It may, in some cases, perhaps, be proper to [\*584] adopt that mode which \*has been suggested, for the purpose of getting some additional assistance, which the circumstances of the case may require. But no authority has been cited to show that the course which has been adopted here is the practice of the court. I certainly think that it is not the practice, and that the purchaser has mistaken his course.

There would be no more difficulty, about the costs, in the one case than in the other. In both cases, if the party applied properly, the court would take care that he should have his costs. I think, therefore, that the Vice-Chancellor's order was right, upon the notice of motion as it then stood; and the only question is, whether the addition which has now been made to it enables me to make any order against Mellersh. The purchaser has certainly put in some words which, if they had stood alone, would have been enough to give Mellersh notice: and I think that, upon the whole, although he does not appear, yet, upon an affidavit of service, an order may be drawn up as against him. The respondents must have their costs. Mellersh, however, would have been the proper party to pay the costs.

Mr. *Wigram* asked that the order should direct that Mellersh should convey within a month after service of the order: but,

THE LORD CHANCELLOR said that, in the first instance, the order must be, simply, that he do convey.

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The reporters are indebted to Mr. Daniell for the following note of the re-



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1840.—Wedderburn v. Wedderburn.

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sult of searches in the Registrar's book, with respect to the case of *Dove v. Dove*, \*mentioned in Mr. Smith's Chancery Practice, vol. 2. [\*585] p. 213, 2d ed.

*Dove v. Dove.*

Motion, in all cases, by purchaser, Joseph Atkinson.

Reg. Lib. 1783, A. 47.

1st November, 1783.—Order for defendant to deliver up possession.

17th February, 1784.—Order that service of the writ of execution of the order upon the clerk in court may be good service.

1st April, 1784.—Order for an attachment.

1st May, 1784.—Order for an injunction.

22d May, 1784.—Order for writ of assistance.

Reg. Lib. 1783, A. 325.

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WEDDERBURN v. WEDDERBURN.

1840: March 4.

Plaintiffs, who had obtained in this court a decree for an account against three defendants, two of whom resided in Scotland, and all of whom had real property there, brought actions in Scotland against the same defendants for the same demand; and they obtained leave from this court to prosecute the Scotch actions so far as should be necessary for the purpose of obtaining such security as it is in the power of the Scotch court to give for the amount which, upon taking the accounts directed by the decree, should ultimately be found due to the plaintiffs.

THE terms of the decree made by the Master of the Rolls in this cause, are stated in the second volume of Mr. Keen's Reports,(a) and the Lord Chancellor's judgment, affirming that decree upon appeal, is reported in a former part of this volume.(b)

Three of the defendants, viz. Sir David Wedderburn, Andrew Colvile, and Alexander Seton having landed \*property in Scotland, and [\*586] Sir D. Wedderburn and Mr. Seton being resident there, each of the plaintiffs (Mr. and Mrs. Hawkins being together considered as one,) commenced an action against the three above named defendants in the Court of Session in Scotland, the nature and objects of which action will best appear from the following report.

The summons in each action was, *mutatis mutandis*, to the same effect, and the statement of one, viz. Charles Wedderburn Webster's, will therefore be sufficient. The summons in his action stated the circumstances of the case, and the bill in chancery, and the decree made at the Rolls, and the Lord Chancellor's affirmance of that decree, and then proceeded in the following terms:—

(a) Page, 752.

(b) Page, 41.

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 1840.—Wedderburn v. Wedderburn.
 

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“That by the said judgment it has been finally determined and decided, *inter alia*, that the children of the said David Webster are entitled to participate, under the circumstances above set forth, in the gains and profits made by the carrying on of the foresaid partnership business by the several and successive firms aforesaid, and partners thereof, since the death of the said David Webster, according to the said David Webster's share and interest in the said copartnership business as aforesaid; and that according to the several and respective proportions thereof falling to the said children, under and by virtue of the said David Webster's will; and that the said Sir David Wedderburn, Andrew Colvile, Alexander Seton, and John Wedderburn (the second,) individually as surviving partners of the said several copartnerships, the said Sir D. Wedderburn as surviving executor of the said deceased Da-

vid Webster, the said Andrew Colvile and Alexander Seton as surviving [\*557] executors and personal representatives, and as such liable for \*the

debts and obligations of the foresaid John Wedderburn (the first,) and also of the said James Wedderburn who was also an executor and personal representative of the said John Wedderburn, the said John Wedderburn (the first,) and James Wedderburn having been the other partners of the said firms, are liable, conjunctly and severally, to the said David Webster's children, for and in payment of their respective shares foresaid, as the same shall be ascertained: That the said parties above named are liable in payment to the pursuer, and the said David Webster's said children, as said is: That the said John Wedderburn (the second) of Auchterhouse is since dead, and no one has taken up his representation, either in heritage or moveables, or become liable, as his representative, for his debts: That under and by virtue of the said David Webster's will, his residuary estate was and is divisible among his said five children, who were surviving at the period of his death, in shares and proportions following; viz. seven twenty-third parts thereof to the said Sir James Webster Wedderburn, his eldest son, and four twenty-third parts to each of his said other four children, and, *inter alios*, to the pursuer, the said Charles Wedderburn Webster: That by the death of the said David Wedderburn Webster, his said share thereof was and is divisible among the then surviving four children of the said David Webster, in the shares and proportions following; viz. to the said Sir James Webster Wedderburn, seven nineteenth parts, and to each of the said other three children four nineteenth parts: That the pursuer is thus entitled to four twenty-third parts, and four nineteenths of four twenty-third parts of the whole gains and profits foresaid: that the share of the said profits effeiring to the said David Webster, and his estate, from the said 1st day of May, 1801, to the 1st day of May, 1837, inclusive, amounts to the sum of 462,076*l.* 7*s.* 2*d.* or

[\*588] thereabouts, conform to an account \*thereof made out under direction of the master in the said High Court of Chancery, and that exclusive of periodical accumulation of interest on the said profits, of which a condescendence will be lodged in the course of the process to follow hereon:

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That the proportions of the said sum of 462,076*l.* 7*s.* 2*d.* exclusively falling to the pursuer, as said is, amount to the sum of 97,279*l.* 4*s.* 7*d.* or thereabouts, exclusive of periodical accumulation, as said is : That as the said Sir David Wedderburn, Andrew Colvile, and Alexander Seton, have lands, heritages, and other property heritable and moveable within Scotland, and reside therein, at least are subject to the jurisdiction of the Scottish courts, and to the executorials of the law within Scotland, necessary it is for the pursuer, and the pursuer is entitled, to have them convened before the Lords of our Council and Session in Scotland, in order to have decree against them, to the effect and in the terms underwritten, so that the pursuer may operate payment of the said sum against the said defenders, and their said estates within Scotland : and although the pursuer has often desired and required the said defenders to make payment to him of the foresaid sum, deducting the payments before mentioned, and of accumulated interest thereon, yet they refuse and delay so to do : Therefore, the said Sir David Wedderburn, residing at Keith House, near Tranent, Andrew Colvile of Craigflower aforesaid, residing in London, and Alexander Anderson or Seton, of Lentall or Lenthall aforesaid, also residing in London, surviving partners foresaid, individually, and as executors foresaid, ought and should be decerned and ordained, by decree of the Lords of our Council and Session, conjunctly and severally, or severally and according to their several and respective liabilities in the premises, to make payment to the pursuer of the foresaid sum of 97,279*l.* 4*s.* 7*d.*, \*or such other sum, more or less, as shall, in the [\*589] course of the process to follow hereon, be ascertained to be the amount of the pursuer's share and proportion of the gains and profits of the said business, effeiring to the estate of the said David Webster, but deducting always therefrom the foresaid sum of 13,055*l.* 7*s.* 3*d.* paid to the pursuer as above set forth ; item, of the legal interest of the balance from and since the said 1st day of May, 1837, and until payment ; item, of the sum of 217,818*l.* 7*s.* 8*d.*, or such further and additional sum, less or more, as shall be ascertained, in the course of the process to follow hereon, to be the pursuer's share and proportion of the accumulated interest on the said profits, periodically, during the said period from 1st May, 1801, to the 1st day of May, 1837, as said is : without prejudice always to the pursuer's claim against the said defenders, and each or any of them, as executors foresaid or otherwise, for the share and proportion of the other means and estate of the said David Webster, for which they are or may be liable to him ; which claim is hereby reserved : And further the said defenders ought, and should be decerned and ordained by decree foresaid, conjunctly and severally to make payment to the pursuer of the sum of 5000*l.* sterling, or such other sum, more or less, as shall by the said Lords be modified, as the expenses of process, besides the dues of extracting the decree to follow hereon, conform to the several writs libelled, laws and practice of Scotland, used and observed in the like cases in all points as is alleged. Our will is herefore," &c.

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 1840.—Wedderburn v. Wedderburn.
 

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The defendants, Colville, Seton, and Sir D. Wedderburn, moved, before the Master of the Rolls, that an injunction might be awarded, to restrain the plaintiffs, and each of them, from prosecuting or carrying on the four [\*590] several suits or actions commenced by them respectively \*in the Court of Session in Scotland, against the defendants, Andrew Colville, Alexander Seton, and Sir D. Wedderburn, to recover the respective shares claimed by the plaintiffs respectively in the profits of the trade or business carried on by the successive partnership firms of Wedderburn & Co., Wedderburn, Colville & Co., Colville, Wedderburn & Co., and Colville & Co., in the decree in the suit in chancery mentioned, and by the partners constituting those firms respectively, and also to restrain the plaintiffs, and each of them, from commencing or prosecuting any other suit or proceeding in the Court of Session, or other court in Scotland, to recover the said shares of profits so claimed by them respectively, or otherwise touching or concerning the matters in question in the suit in chancery; and that the plaintiffs might pay the costs of that application.

In support of this motion, the defendant Colville made an affidavit, in which he stated that he was advised, and verily believed, that according to the law of Scotland, and the existing practice of the Court of Session, the deponent and Alexander Seton and Sir D. Wedderburn could not defend the said suits or actions, by the plea of *lis alibi pendens*, without at the same time pleading all their defences on the merits, which would involve all the matters and grounds which existed in the present suit: and the solicitor of the defendants made an affidavit, in which he stated that no such account as was in the summons alleged to have been made out under the direction of the master of the Court of Chancery, had ever been made out; and that the proceedings which had taken place under the decree had been confined to the production of the books and documents in the defendants' possession, relating to the matters in question, and to the carrying in of the executorship accounts of the estate of the testator, David Webster, and the examination [\*591] of the defendants, Colville and Seton, upon interrogatories, and to the carrying in of a state of facts by the plaintiffs, as to the value of the testator's interest in the firm of Wedderburn, Webster & Co., on the 1st of May, 1801, upon which state of facts several attendances had taken place before the master, and to the carrying in of a state of facts by the plaintiffs, as to the capitals employed by the respective partnerships in the several succeeding firms mentioned in the decree, upon which state of facts the master had been once attended, but that such attendance had been since the commencement of the actions in the Court of Session.

On the 23d of January, 1840, the Master of the Rolls made an order for an injunction, in the terms of the notice of motion, until the further order of the court; and he ordered the plaintiffs to pay the costs of the application.

The plaintiffs now moved, before the Lord Chancellor, that the order of

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the Master of the Rolls might be discharged, or that the plaintiffs might be at liberty to carry on the four several suits or actions commenced by them respectively in the Court of Session in Scotland, against the defendants Colville, Seton, and Sir D. Wedderburn respectively, or such other proceedings as they might be advised, for the purpose of compelling those defendants to give security for so much as might be decreed to the plaintiffs in respect of the profits of the trade or business carried on by the successive firms of Wedderburn & Co., Wedderburn, Colville & Co., Colville, Wedderburn & Co., and Colville & Co.

In support of this motion, an affidavit was made by Mr. Thomas Collingwood Ker, a law agent in London, \*who stated that he knew [\*592] and was well acquainted with the law of Scotland, and the practice of the courts of justice there: that all parties prosecuting their claims before the courts of justice in Scotland, were entitled, immediately upon the summons being issued, to sue out, as a matter of right, a writ called a writ of inhibition and arrestment, by which the defendants were prevented from alienating their property, until they should have given security for answering the amount of the plaintiffs' demand; that he had acted as the agent, in this country, of the plaintiffs, relative to the proceedings against the defendants in Scotland; that such proceedings had only been taken for the purpose of compelling the defendants, by means of the writs of inhibition and arrestment, to give security for the amount of the plaintiffs' demand in the suit in chancery, and that he (the deponent) had received instructions not to press forward such actions after such security should have been given: that, acting upon such instructions, he (the deponent) was ready, so soon as the writs of inhibition and arrestment should be complete, or such security should be given, to stay all further proceedings in the actions till the termination of the suit in chancery; and that, in fact, in preparing the several summonses, the proceedings in chancery were set out therein respectively, solely for the purpose of showing to the Court of Session that after such inhibition and arrestments, or such security given, it would not be necessary to proceed further with the actions.

In a further affidavit, made by the same deponent, on the 21st of February, 1840, he stated that he had ascertained that each of the three defendants, Colville, Seton, and Sir D. Wedderburn, was possessed of considerable real estates in Scotland, and that the defendant Colville resided there for several months in each year, and that the defendants Seton and Sir D. Wedderburn, resided \*there entirely. He also stated, that by the law of [\*593] Scotland it was competent for a party, by a simple letter missive, which might be prepared in a few hours, to settle his estate upon his family, and deprive his creditors of all right against the same; and that he, the deponent, had no doubt that if the defendants had received notice of the proceedings intended to be taken by the plaintiffs, they would have taken the necessary steps to deprive the plaintiffs of any right against their estates:



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 1840.—Wedderburn v. Wedderburn.
 

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that by the practice of the Court of Session, it was the duty of the pursuer, after issuing his writ of summons, to have the same called, or, in other words, entered on the rolls of the court, within sixty days from the date thereof; and that in the event of his not doing so, it was competent for the defendant to have such summons protested, the result of which was, that the action was entirely defeated, and gone, and was treated in the same manner as if it had never existed; that the time for entering the summonses issued by the plaintiffs against the defendants Colville, Seton, and Sir D. Wedderburn would expire on the 25th of February, 1840, after which day it would be competent for the defendants to proceed immediately to have such summonses protested for not being called.

*Mr. Jacob, Mr. Stuart and Mr. Koe*, in support of the motion.

Upon *Mr. Wigram and Mr. Colville* appearing in opposition to the motion, and in support of the Master of the Rolls' order,

THE LORD CHANCELLOR said:—So far as this motion seeks to discharge the order of the Master of the Rolls, I need not give you any trouble, [\*594] *Mr. Wigram*, because I think that order perfectly right. \*There being a decree—no sum ascertained, but a decree—the Master of the Rolls found the parties proceeding, for the same purpose, in the Court of Session in Scotland; and it was quite of course to restrain them from so doing. But the question upon the other part of the motion is, whether, some of the defendants being out of the jurisdiction, and having property out of the jurisdiction, the court will not allow the plaintiffs to take such proceedings as shall insure them the benefit of their decree here. It is to that I wish you to direct your attention.

*Mr. Wigram and Mr. Colville*, in opposition to the motion.—It does not appear that there is any proceeding by which the plaintiffs can merely, as they say, compel the defendants to give security for the amount which may (if any amount-shall) be established against them in the suit in chancery. The plaintiff in an action, such as that which the plaintiffs in this suit have commenced in Scotland, may sue for a particular demand; and in the course of that suit he may induce the court to take those proceedings which shall be necessary for the ultimate security of the decree or judgment to be obtained there. So it is in this country, with the exception that, here, the court protects the property in those cases only in which the specific property is the subject of the suit. The plaintiffs have not shown that the proceedings in Scotland can be used for the limited purpose which they suggest: and if the proceedings there are to go on, they must go on with the right, on the defendants' part, to take every advantage to which the course of the court in Scotland entitles them. The circumstance of the plaintiffs having obtained an interlocutory decree here, directing that the plaintiffs and defendants shall account together, does not give the plaintiffs a right to proceed [\*595] \*in Scotland and in this country for the same purpose; but the circumstance that the plaintiffs have proceeded so far in their suit here



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makes it more improper that they should institute a suit for the same purpose elsewhere; and it is clear, that, if no decree had been obtained, the plaintiffs would have no right to adopt this double proceeding; *Mocher v. Reid*,<sup>(a)</sup> *Wilson v. Wethered*,<sup>(a)</sup> *Booth v. Leycester*,<sup>(c)</sup> *Edgecumbe v. Carpenter*.<sup>(d)</sup>

If your lordship were to make a special order, allowing the plaintiffs to go on, to a certain extent, with the actions in Scotland, the defendants would be in a worse position than if those actions went on in the ordinary course; for you would deprive the defendants of the right, which they would have, under ordinary circumstances, of either going into the case upon the merits, or pleading *lis alibi pendens*. In point of fact, however, the consequence of allowing the action in Scotland to proceed at all must be that the whole question in the chancery suit must be tried over again; for it is only in such an action that an arrestment can be obtained. The writ of arrestment stops all the rents in the hands of the tenants of the estates, and has the effect of appointing a receiver of the property, and can only be got rid of by giving sufficient security to answer the plaintiff's demand; but how could the amount of security necessary in this case be ascertained, without taking the whole account? There is no allegation or suggestion of insolvency on the part of the defendants, and no special case is made to show that, in this particular instance, such assistance as the plaintiffs say they can derive from the court in Scotland is necessary; and unless such necessity [\*596] can be shown, the court will not depart from its ordinary rules of preventing double suits.

Mr. *Jacob*, in reply, said he did not admit that the effect of a writ of arrestment would be that the owner of the estate would be prevented from receiving his rents. The plaintiffs would not prosecute the same demand in the Scotch courts, unless the defendants should, by forcing them on, compel them so to do.

THE LORD CHANCELLOR:—I should be very glad if I could be furnished with any case upon this subject; but no such case having been produced, I am under the necessity of disposing of this question between the parties by analogy to what regulates the practice of the court in cases which are as nearly analogous to the present as any that can be found.

As I before stated, I am of opinion that the order of the Master of the Rolls is quite right. There can be no doubt that the general rule precludes parties from proceeding in any other court for the same purpose for which they are proceeding in this court, whether the other proceedings are taken in this or in any other country; and if the party conceives there are any circumstances in his case which constitute an exception to the rule, I think that his proper

(a) 1 Ba. & Be. 318.

(b) 2 Mer. 406.

(c) 1 Keen, 579; and 3 Mylne & Craig, 451.

(d) 1 Beav. 171. [In this case an injunction was granted to one defendant against a co-defendant.]

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 1840.—Wedderburn v. Wedderburn.
 

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course is, not to take proceedings in another court, of his own authority, but to apply to this court for permission to take such proceedings.[1]

Now here I find a decree, ascertaining no balance, establishing no right ; but a decree against certain defendants for an account ; the balance, [\*597] either one way or \*the other, being to be ascertained by means of inquiries before the master. I find that some, at least, of the defendants are out of the jurisdiction ; that they are living in Scotland, and have landed property there, which, by the course of the Court of Session, may be rendered available as a security for what is due from the defendants. There is no mode in this country by which that security can be obtained, and the result might be that after the plaintiffs had ascertained the amount of their demand, they might be unable to enforce payment of it ; because I have neither the defendants here, nor have I here any property of theirs which could be made available.

The result would be that after the plaintiffs had ascertained the amount due to them, and had had their demand established on further directions, they would then have to proceed to Scotland, not for the purpose of establishing their demand, but for the purpose of obtaining security for the satisfaction of the demand which had been established ; but at that time they might not find, in Scotland, either the defendants, or any property of theirs.

Under these circumstances, the question is whether this court should carry the rule so far as to preclude the plaintiffs from adopting such proceedings as shall ensure them the means of satisfying what shall be found to be the amount due to them ; and it does appear to me that such an extension of the rule would, under color of doing equity to the defendants, do a great injustice to the plaintiffs.

Now, it is perfectly true that the existing suit in Scotland is,—for although it has been disputed, there can be no doubt of the fact that it is,—in [\*598] its nature, a suit \*to establish the demand. The object of it, however, is stated to be, and must be considered as being, not to establish the demand—which the plaintiffs have succeeded in establishing in this court, so far as they could—but to secure payment.

If the plaintiffs only ask to proceed in the suit in Scotland, so far as may be necessary to obtain security for the sum of money which shall be found to be due, I do not see how the defendants can be heard to complain of it.

What the defendants have a right to be protected against is, being doubly vexed ; and it would be a cause of complaint if the plaintiffs were allowed to go on to litigate in Scotland the question which is in dispute in this court ; but that is not their object, and their object is that which is not the subject of litigation here.

It is perfectly clear that the defendants may, if they please, compel the plaintiffs to go on with the suit in Scotland ; for they may apply to discharge

[1] *Glascott v. Lang*, 3 Myl. & Cr. 451, 457, n. 1. 1 Keen, 580, n. 1.

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the arrestment ; but I do not think they can much complain, if the suit only proceeds at their own instigation.

If, however, the suit in Scotland remains where the plaintiffs say it is intended that it should remain, the defendants will be in the same position as if it had been instituted after the amount of the demand had been established ; but with this difference, that the plaintiffs will then have already obtained security for the amount which will have been found due to them.

Now, I know nothing of these defendants, or of any danger there may be that the property will be alienated ; but, of course, I must deal with this case as I should \*with cases in which danger was apprehended. [\*599] I think, therefore, the proper order for me to make will be, that the plaintiffs should be at liberty to proceed in Scotland so far as may be necessary to obtain such security as the Court of Session may give for the demand which they may establish in this suit. That will, of course, leave it open to the plaintiffs not to proceed in the suit, but to take such steps as the defendants may compel them to take.

I do not at all prescribe to the Court of Session what course they should pursue. They, perhaps, may inhibit the plaintiffs from proceeding here.

I carefully avoid saying where the debt is to be recovered ; but I allow the plaintiffs to proceed, for the purpose of obtaining such security as the practice of the Court of Session affords for what may ultimately be found due.

I consider that the plaintiffs are entitled to such security as the practice of the Court of Session gives for what shall ultimately be found due ; whether it be ascertained in the Court of Session or here.

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THE LORD CHANCELLOR, in answer to a question from Mr. Jacob, afterwards said that he intended to allow the already existing proceeding in Scotland to go on ; but so far only as might be necessary to obtain security for what should be found due from the defendants to the plaintiffs.

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“ His lordship doth not think fit to make any order as to that part of the notice of motion which seeks to \*discharge the order of the [\*600] Right Honorable the Master of the Rolls. But, upon the rest of the motion, now made as an original motion to his lordship, his lordship doth order that the plaintiffs be at liberty to proceed in the suits or actions commenced by them in the Court of Session in Scotland, or take such other proceedings as they may be advised, so far only as may be necessary for the purpose of obtaining security, according to the practice of the Court of Session, for the forthcoming of the property of the defendants in Scotland, to answer the demand of what may be found due from the defendants under the decree in these causes.”

Reg. Lib. 1839, B. 412.

1840.—Lozon v. Pryse.

## LOZON v. PRYSE.

1840: May 6, 8; December 16.

Trees of the growth of twenty years or upwards, sprung from the roots or stools of old trees formerly cut down, are within the exemption of the 45 Edw. 3, c. 3, and are not titheable.

THIS was a bill filed by persons claiming, as lay impropriators of the rectories of six parishes in the county of Cardigan, to be entitled to all the tithes both great and small, and particularly to the tithe of wood, within the parishes. It charged that the defendant, who was the occupier of divers farms and lands within the parishes, had, within six years last past, felled and cut down, upon and from his farms and lands, large quantities of underwood, poles, and young trees, and other trees which were not of the growth of twenty years, or which grew from the roots or stools of trees which had formerly been cut down, and had not set out the tithes thereof, or made compensation to the plaintiffs for the same, as he ought to have done, although he had rendered compensation for all other the tithes payable by him.

[\*601] And it further charged that he had refused to \*pay tithe on any timber, whether growing from stools or otherwise, above twenty years growth: and it prayed an account and payment of the value of the tithes of all the wood which had been so felled and cut down by the defendant within the last six years.

The answer of the defendant, after admitting the title of the plaintiffs as impropriators of the rectories in question, and that the defendant had within six years last past felled or cut down, upon and from his farms and lands, "divers quantities of underwood, poles, and young trees which were not of the growth of twenty years, some of which grew from the old stools or roots of trees which had been formerly felled or cut down, and other parts of the underwood, poles, and young trees so felled or cut down by the defendant within the said six years, and being of the growth of twenty years, grew, not from the old stools or roots of trees formerly felled or cut down, but from their own respective roots," further admitted that the defendant had within six years last past felled or cut down, upon and from his farms and lands, "divers trees which were, at the time of the felling thereof respectively, *gras bois* or great wood, and of the growth of twenty years and upwards, and which respectively grew from the old stools or roots of trees which had formerly been felled or cut down." The answer further admitted that the plaintiffs were entitled to the tithes of all such of the said underwood, poles, and trees felled or cut down by the defendant as at the respective times of the felling and cutting down thereof, respectively, was not of the growth of twenty years, and stated that the defendant always had been and was now willing to account for such tithes; but "as to the said trees and wood which had been felled or cut down by him within the said six years last past,

[\*602] and which were *gras bois* or great wood, and were of the \*growth of twenty years or upwards, and grew from the roots or stools of

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1840.—*Lozon v. Pryse*.

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trees which had formerly been felled or cut down," the defendant thereby submitted that all such trees and wood were exempted from the payment of tithes, either by the statute 45 Ed. 3, c. 3, or otherwise: and he claimed the benefit of such exemption.

Neither party went into any evidence; and the cause having come on to be heard before the Lord Chancellor as an original cause, the only question discussed at the hearing was, whether trees of the growth of twenty years and upwards, and which grew from the roots or stools of trees which had been formerly cut down, were or not titheable, that being in fact the only question put in issue by the answer.

Mr. *Richards*, Mr. *R. B. Chichester*, and Mr. *Bacon*, for the plaintiffs.

Mr. *Wigram*, Mr. *Eagle*, and Mr. *John Wilson*, for the defendant.

The argument on both sides consisted of an elaborate and minute commentary on the numerous cases which were conceived to furnish a judicial exposition of the statute. Those cases are all reviewed and considered in the Lord Chancellor's judgment.

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*Dec. 16.*—THE LORD CHANCELLOR:—The bill in this case alleges that the defendant had cut trees which grew from the roots or stools of trees which had been formerly felled or cut down, and that the defendant refused to pay tithe on any timber, whether grown from stools or otherwise, of above twenty \*years growth. The defendant, by his answer, [\*603] says, that he had cut "divers trees which were, at the time of the felling and cutting down thereof respectively, *gros bois* or great wood, and of the growth of twenty years and upwards, and which respectively grew from the old stools or roots of trees which had formerly been felled or cut down."

There was no evidence in the cause; and the question between the parties is to be decided upon this statement in the answer; and as by the stat. 45 Edw. 3, *gros bois* of twenty years, or of greater age, is declared not to be subject to tithes, without any restriction as to the origin of the *gros bois*, whether growing from seed or from roots or stools, and *gros bois* being held to mean all trees being timber, either at common law or by custom, it would appear that the defendant's case was precisely covered by the statute.

This statute, however, it is argued, has received a construction, now binding upon all courts, by which it has been held not to apply to timber trees growing from roots or stools. It cannot, in strictness, be said in this case that such trees are not *gros bois*, because the passage I have read from the answer states that they are *gros bois* of twenty years growth, which brings them within the very terms of the statute. It must, at all events, be assumed that the trees cut, and in respect of which tithes are claimed, were timber trees.

Property to a large amount must be involved in this question, which, from the state of the decisions, has become one of great difficulty.

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That tithes were payable of *silva cædua* was undisputed; but what wood came under that description was, from the earliest times, the subject [\*604] of contest. What the church claimed as coming under that description is apparent from the constitution of a provincial council held in the 17th of Edw. 3, under Archbishop Stratford, as stated in Selden.(a) It defines *silva cædua* to include wood of every description, which, after the tree has been cut, grows from the stool or root. It does not appear that the clergy ever claimed tithes of timber trees growing from seed. The answer of the Archbishop of Canterbury to the complaint of the commons in 21 Edw. 3,(b) confines the claim to underwood. But the contest between the clergy and the landowners being whether tithes should be payable for all trees which grew from the stool or root of a tree which had been cut, the act of 45 Edw. 3, c. 3, was passed, which stating the complaint of the landowners, that when they sold and cut *leur gros bois* of the age of twenty years and upwards, the clergy prosecuted in the Spiritual Court for tithes of such wood in the name of this word called *silva cædua*, it was ordained that in such a case a prohibition should be granted.

Now, as the clergy did not claim tithes of timber trees growing from seed, but did claim tithes of all trees of whatever age growing from the stools and roots of trees which had been cut, the provisions of this enactment must have been intended to meet such claim; and its construction must necessarily be that no tithes should be payable for timber trees so growing from stools and roots, if above twenty years old.

It appears to me, that Chief Baron Alexander was fully warranted in what he stated in the case of *Evans v. Rowe*,(c) that there would be no [\*605] doubt of this being the right construction, if the question had been unfettered by decision. He thought that the decisions in favor of a contrary construction made it his duty to follow them, notwithstanding his own opinion to the contrary. Barons Garrow and Hullock concurred in that opinion, but without entering into any discussion of the authorities, and Baron Graham differed from the majority. It has been my duty to examine these authorities with the greatest care, that I might satisfy myself whether I ought to be bound by them.

Soon after the passing of the act, in Hil. 50 Ed. 3, C. P.,(a) a case arose in prohibition against a suit in the Spiritual Court for the tithes of timber, to which it was answered that the suit was only for tithes of *silva cædua*; but it being observed that, under this word, every kind of wood which would bear to be cut and would grow again was included; and that so tithes were claimed of great trees: the party was called upon to plead that he was not suing for great trees. Now such great trees, if attempted to be included in the term *silva cædua*, must have been trees growing from the stools of

(a) *Historie of tithes*, c. 8, s. 28.(b) 4 *Eag. & Y.* 9.(c) 1 *M'Cl. & Y.* 577.(d) 1 *Eag. & Y.* 26; 1 *Gw.* 5.



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trees cut. This, therefore, is a contemporaneous exposition of the statute that great trees growing from stools are protected by it.

In the case in prohibition in 11 H. 4, (a) although there is great obscurity in the statement, it seems clear that the contest was as to wood which had been before cut; and that the party suing in the Spiritual Court did not therefore claim tithes of such wood of whatever age it might be; but alleging that the trees were only of eighteen years growth, concludes \*thus, "and so for trees of such age it is lawful for us to sue." [\*606]

In the case of *Daws v. Mollins*, in the 26th of Eliz., (b) in prohibition against suing in the Spiritual Court for tithe of wood, the defendant pleaded that the loppings of which tithes were claimed were of ash, beech, and of oak, *de stipitibus prius succisis crescentes*. But it was ruled "that because the defendant had not shown that the trees were before cut within twenty years before the last succession, tithes shall not thereof now be paid."

Lord Coke, (c) in commenting upon the stat. 45 Ed. 3, makes no distinction between trees twenty years old, whether growing from seed or from stools; but he says, "if a man cut down timber trees, tithes shall not be paid for the germins or branches which grow out of the roots, of what age soever; for that the root is parcel of the inheritance." This proposition has been questioned: but that is not the point in this case. In that case, the privilege for the germins or branches, though cut under twenty years, was supposed to rest upon the privilege of the parent stock or root: in this, the tree above twenty years old is claimed to be privileged in its own right from having attained that age.

It appears, from these authorities, that for 200 years after the act 45 Ed. 3, the construction put upon it was uniform, and consistent with the obvious meaning of its provisions.

The next case which appears to have occurred was that of *Turner v. Smith*, (d) which has been relied \*upon in support of both [\*607] sides of the argument. It is not easy to draw any satisfactory conclusion from it. Certainly stub oak was held to be liable to tithe: but the reason assigned by the court was, that such wood was never accounted timber in Essex: and it was held that trees of oak and ash, being seconds or standards, were not liable to tithes. If, therefore, the terms "seconds or standards" mean trees growing upon stools, the decision is in conformity with all those which preceded it; and it appears that the statute 35 H. 8, c. 17, describes shoots left standing in a coppice wood upon the usual cutting by the term "*standils*." The same observation applies to the case of *Northleigh v. Collard*, (e) in which standils called "black coates and white coates" were declared not to be liable to tithes, "they being timber." Upon examining the pleadings in *Greenway v. The Earl of Kent*, (g) I do not find it

(a) 1 Eag. &amp; Y. 28.

(b) 2 Leon. 79; 1 Eag. &amp; Y. 86.

(c) 2 Inst. 643.

(d) 1 Eag. &amp; Y. 526; 2 Gwill. 529.

(e) 1 Eag. &amp; Y. 589; 1 Wood, 328.

(g) 1 Eag. &amp; Y. 677; 1 Wood, 479.

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stated whether the trees in question grew from seed or from stools ; and certainly the distinction between the two is not taken.

In the year 1724, the case of *Bibye v. Huxley* was decided.<sup>(a)</sup> This case, also, is relied upon by both sides in the argument. It appears that the decree, as printed in Wood, with the exceptions in the brackets, is inaccurate, there being no such brackets in the decree itself ; and if it be read without the brackets, "beech wood proceeding from stools originally maiden trees above twenty years growth" will be part of the exception, and therefore protected from the payment of tithes. It must be observed, that if these words

be not part of the exception, the decree would declare such beech  
[\*608] \*wood to be liable to tithes, to the exclusion of beech wood proceed-

ing from stools originally maiden trees under twenty years growth, unless included in the first branch of the decree directing the tithes of wood not within the exception ; and, if so included, why were the tithes of any beech, not being maiden trees of twenty years growth, also included, and why separately directed ? But however that may be, as the words "twenty years growth" must, I think, be referred to the maiden trees, and not to the wood growing upon the stools, the decree does not affect the question whether twenty years growth of the tree cut does not protect it, although it grew upon a stool. I cannot follow Sir William Alexander in his conclusion that the Court of Exchequer, in this case, indisputably held that trees growing from stools, of whatever age, are titheable. On the contrary, the exceptions of oak and ash, and maiden trees of beech above twenty years growth, from the term maiden being applied to the beech, which is timber only by custom, and not to the oak and ash, may be considered as implying that oak and ash of twenty years growth were protected, though not maiden trees, that is, though growing upon stools.

The case next in date is *Walbank v. Hayward*,<sup>(b)</sup> a case of the highest importance on account of the influence it has had in the decisions which have lately taken place. The decree directs an account of wood which grew from stools or roots of trees theretofore fallen or cut down by the defendants, of any age, size, or growth whatsoever, and also an account of underwood.

Of this case there is no account except from the proceedings them-  
[\*609] selves. What points, therefore, were \*argued, or what decided, can only be discovered from such proceedings, and they prove that, in directing an account of wood which grew from the stools or roots of trees which had been before cut, no distinction is made between wood which had been so growing for twenty years and upwards, and wood which had been cut under that age. Upon examining the answer, however, it appears that the defendants had not, in their defence, taken any such distinction, or in terms claimed exemptions from tithes for such trees so growing from stools

(a) Bunb. 192 ; 1 Eag. & Y. 805 ; 2 Wood, 237 ; 2 Gwill. 657.

(b) 3 Wood, 512 ; 3 Eag. & Y. 1245.

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or roots as were above twenty years old when cut. Their defence was, that no wood growing from the stools or roots of timber trees which had been cut when above twenty years old was liable to tithes, and the decree negatives this defence. It seems very probable, therefore, that the other point, namely, the exemption of timber trees above twenty years growth, though growing from stools, was never raised in the argument, as it certainly was not suggested in the answer; and, if so, this decree ought not to have any weight attached to it in the present consideration. It is well observed by Mr. Eagle, in his "Observations upon the Case of *Evans v. Rowe*," that if this case had really decided so important a point, it is incredible that some notice should not have been taken of it, and that the right so established should not have been asserted in some of the many instances in which it must have existed.

In *Chichester v. Sheldon*,<sup>(a)</sup> the decree directed an account of all wood which had sprung from stools or roots, without regard to the age such wood had attained: but it is observable, that Sir Thomas Plumer, in his judgment, scarcely touches upon this particular point, although he discusses at large the question, how far "germins of timber trees of twenty years [\*610] growth were protected by the privilege of the parent tree, and offered an inquiry into the facts to enable the parties to raise that point. Sir Thomas Plumer referred to *Walton v. Tryon*,<sup>(b)</sup> *Walbank v. Hayward*,<sup>(c)</sup> and *Lewis v. Snell* in the Exchequer, Michaelmas term, 1811;<sup>(d)</sup> but we have now Baron Graham's explanation of that case, in *Evans v. Rowe*; and he says that he was one of the court who decided it, and that it never entered into his contemplation, nor, as he believes, of any one of the court, that shoots from stools might be suffered to grow to seventy or eighty years, and be the only timber in the country. Upon referring to the pleadings in that case, it appears that the defendant said, that part of the wood cut grew from old stubs and stools of timber, and which, being thirty-two or thirty-three years old, ought to be deemed and considered as timber, and, as such, not titheable. What the evidence was, does not appear, but the decree directed accounts of timber trees cut under twenty years growth, of coppice wood and underwood, and of germins cut from the stools of trees above twenty years growth, and whether any part had been cut from stools above twenty years growth, mixed and cut with coppice and underwood. The deputy remembrancer found that a large quantity of such germins had been cut; but the ultimate decree was only for coppice wood and underwood. For what purpose this special inquiry was directed, or why it was confined to germins cut from stools of trees above twenty years growth, does not appear. It can hardly have been the purpose of protecting such germins, unless mixed up with and sold with underwood: but certainly it is not an authority for the proposition, that timber trees of above twenty years growth are [\*611] liable to tithes if they grow upon stools.

<sup>(a)</sup> Turn. & Russ. 245; 3 Eag. & Y. 1102.

<sup>(c)</sup> 3 Wood, 512; 3 Eag. & Y. 1245.

<sup>(b)</sup> Amb. 130; 2 Eag. & Y. 123.

<sup>(d)</sup> Turn. & Russ. 247; 3 Eag. & Y. 1388.

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In *Walton v. Tryon*,(a) another case relied upon by Sir Thomas Plumer, Lord Hardwicke does not touch upon the question, whether timber trees of twenty years growth are liable to tithes if they grow upon stools.

*Ford v. Racster*,(b) the other case relied upon by Sir Thomas Plumer, is entitled to the utmost respect ; and there are many of Lord Ellenborough's observations in it, tending much to the support of Sir Thomas Plumer's opinion. The action was debt on the statute 2 & 3 Edw. 6, for not setting out tithes of coppice wood, being *silva cædua*. The coppice, it appeared, was, in regular course, cut under the age of twenty years ; but the black poles in question were left to stand beyond that time, and were ultimately cut, and used for laths and posts and rails, and carpenters' purposes. They were not esteemed timber in the country, and had always paid tithes. The two questions which have been so frequently confounded arose also in this case, for not only were these black poles themselves of more than twenty years growth, but they sprung from stools of trees above that age. Lord Ellenborough's observations are very much addressed to this latter point. But his lordship very justly observes, that to be exempted from tithes, the wood must not only be twenty-years old, but *gros bois* or timber either at common law or by custom ; and assuming that the wood in that case was not timber at common law, its being timber by custom was negatived by the evidence and by the finding of the jury ;

[\*612] and he seems to allude to, although he does not follow out a "distinction which may explain the apparent inconsistency in many of the cases. A copse growing, as it always does, from the stools of old trees, which is periodically cut, has nothing of the character of timber, and could not therefore acquire that character by being permitted to stand above twenty years. In *Cornwall v. Haws*,(c) the wood was held liable to tithe, not because it grew upon stools, but because it was merely firewood, though of more than twenty years growth. In such a case, all the germins are left to grow from the old stool ; but if it be intended to raise a timber tree from such stool, one shoot only is permitted to stand, and the question is, whether such shoot, if deemed timber, be not privileged after twenty years growth. This question is not touched by the case of *Ford v. Racster*, because in that case the character of timber was negatived by the evidence and the verdict. It is also to be observed, that the judgment in that case was the unanimous opinion of the court, of which Sir John Bayley was one, and it was decided in May, 1815 ; and that learned judge, in *Underwood v. Buckle*, Hereford summer assizes, 1812, (cited in *Evans v. Rowe*,(d)) is stated to have directed the jury against the claim to tithes of timber trees of more than twenty years growth, though growing from stools.

Such was the state of the authorities when the case of *Evans v. Rowe*(d) arose in the Exchequer, which was decided in the year 1825. It appears to

(a) Amb. 130 ; 2 Eag. & Y. 123.

(c) 1 Sid. 300 ; 1 Lev. 189 ; 1 Eag. & Y. 450.

(b) 4 M. & S. 130 ; 3 Eag. & Y. 710.

(d) 1 M. & L. & Y. 577. See p. 581.

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have been thought to be a case of great difficulty by Chief Baron Richards as, after having heard it, he directed it to be brought before the whole court, and it was ultimately decided when Sir William Alexander was Chief Baron.

\*The decree in that case is an authority for the plaintiff; but, in [\*613] point of reasoning and authority, it is a very important case for the defendant. Sir William Alexander says, that if he were to decide the case upon principle, he should have no doubt in saying that the bill ought to be dismissed; but he thought himself bound by the decisions; and yet he says that *Walbank v. Hayward* is the only case which entirely warrants the conclusion of Sir Thomas Plumer in *Chichester v. Sheldon*.

The case of *Amler v. Jackson*, decided in the year 1769,(a) has also been relied upon in support of the claim; but Sir William Alexander very truly observes that we do not know sufficient of that case to make it any authority. The plaintiff claimed tithes of wood which grew from stools, and which was of more than twenty years growth, but upon a distinct allegation that such wood was not timber. The answer claimed exemption from tithes, insisting that the wood was timber. Witnesses were examined, and the decree directed the account; but what was the evidence, or what were the grounds of the decree, does not appear. Unless the defendants proved that such wood was timber, the question now under consideration did not arise.

I have now mentioned all the cases which, upon the present or former discussions upon the point, have been found to be applicable; and bearing in mind what the real question is, it will be seen, from a short recapitulation of the points really decided in them, how little of positive authority there is to support the opinion attributed to Sir Thomas Plumer. The question is, whether trees, being timber trees, and above twenty years growth, are liable to tithes, because they grow from the \*roots or stools of [\*614] trees; and it is most essential to keep the question distinct from the other, formerly much agitated, but very different from the present; namely, whether germins or shoots from the roots or stools of timber trees, cut down after they had attained a growth of twenty years, are exempt from tithes, because the original tree was so privileged. The confounding together of these two questions has led to all the difficulty in the case.

From the authorities to which I have referred, it appears clear that the 45 Edw. 3, c. 3, intended to protect timber trees of twenty years growth, though produced from stools, and that this construction of the statute was recognized and acted upon for very many years afterwards.

In *Turnor v. Smith*, in the year 1680,(b) the first case relied upon in support of the claim to tithes, and in *Northleigh v. Collard* (c) timber trees of above twenty years growth, and which, it appears, must have grown upon stools, they being in the first case called seconds or standards, and in the lat-

(a) 3 Wood, 225. (b) 2 Gw. 529; 1 Eag. & Y. 526. (c) 1 Wood, 328; 1 Eag. & Y. 589.



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ter standils, were held to be exempt from tithes. So in *Greenway v. Earl of Kent*, in 1705,(a) the plaintiff only claimed tithes for poles above twenty years old, growing upon stubs or stocks, upon the ground that they were not fit for timber. The defendant insisted that these trees were exempt from tithes, except such as had been mixed with the underwood; and the decree declared that tithes were due for such wood above twenty years old, which had been cut and corded, but not for such as had not been so corded.

[\*615] \*At this time it must have been assumed that timber trees above twenty years old were not liable to tithes, though growing upon stubs or stools. If the decree in *Bibye v. Huxley*, 1725,(b) is to be construed so as to bring beech wood proceeding from stools within the exception, it is a decisive authority against the claim now asserted; and if it be not to be so construed, it proves nothing against the exemption, because there was no proof that such beech wood, so growing from stools, was accounted timber.

*Walton v. Tryon*,(c) was decided in the year 1751, and is far from being an authority in support of the claim. There is, indeed, reason for considering it as an authority against it, for, in commenting upon Lord Coke's opinion, who distinctly states that all timber trees of twenty years growth were privileged, and that germins from stools of trees of that age partook of the privilege of the parent tree, Lord Hardwicke says, that Lord Coke's general rules had not been contradicted, except as to the germins from stools; leaving therefore the opinion as to timber trees from stools, not only without objection, but confirming it. *Amler v. Jackson*, was determined in 1769, and, as already observed, cannot be considered as an authority in support of the claim.

This brings us to *Walbank v. Hayward*,(d) decided in the year 1775. At this time, four centuries had elapsed since the act 45 Edw. 3, during which period there is no trace of any decision departing from the principle prescribed by that act. It therefore appears to me to be most strange, [\*616] that there should have been attributed \*to that case the weight of a decision directly subversive of that principle so established and acted upon. To give it any weight much more information respecting it would be required than can now be obtained, and any construction of it would be to be preferred to that which would show it to be a decision clearly contrary to the law as it was understood at the time. After that case there was *Lewis v. Snell*, in 1811, which Mr. Baron Graham, in *Evans v. Rowe*, informs us was never intended or supposed to touch this question. *Underwood v. Buckle*,(e) was in 1812, in which Mr. Justice Bayley, ruled at *nisi prius*, that timber trees of twenty years growth from old stools were not liable to tithes. *Ford v. Racster*, was in 1815, the facts of which show that the decision of that case cannot be considered as an authority in the present, how-

(a) 1 Wood, 479; 1 Eag. & Y. 677.

(b) 2 Wood, 237; 1 Eag. & Y. 805.

(c) Amb. 130; 2 Eag. & Y. 123.

(d) 3 Eag. & Y. 1245; 3 Wood, 512.

(e) Stated in 1 Eag. on Tithes, 251; and see 1 M'Lel. & Y. 581.



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ever important the observations of Lord Ellenborough may be. So that in the year 1823, when Sir Thomas Plumer decided *Chichester v. Sheldon*, there was no authority against the title to exemption from tithes for timber trees of twenty years growth, though proceeding from stools, founded as it was upon statute, and recognized and acted upon in numerous instances for 450 years, but the obscure case of *Walbank v. Hayward*, if that is to be considered as a decision, and some observations of Lord Ellenborough in *Ford v. Rucster*, upon a case not before him.

It is possible that Sir Thomas Plumer intended to express an opinion upon that point, although it is not easy to find expressions in his judgment amounting to any such expression of opinion, and if he did, he had no facts before him authorizing him to decide it; and not only were there no facts to raise the question, but he had not heard any argument upon it; the counsel for the defendant saying that the only question was, whether [\*617] tithe was due for *germins* cut down under twenty years growth, when sprung from the roots of trees not cut down till upwards of twenty years growth; and yet, upon the supposed authority of this case, aided by that of *Walbank v. Hayward*, the Court of Exchequer, in *Evans v. Rowe*, in the year 1825, contrary to the opinion of Mr. Baron Graham, decided against the exemption claimed; Chief Baron Alexander stating, in very distinct terms, and Mr. Baron Hullock intimating, that, if it had not been for these cases, they should have decided in favor of it.

I am now called upon to consider whether I am bound to follow the same course. I say *bound*, because, with the opinion I have formed of the original right under the statute, and the subsequent exposition of the law and the practice under it for above four centuries, nothing but feeling bound by the principles and rules upon which courts of justice have thought it right to act upon similar questions of discretion, could induce me to aid in perpetuating what I believe to be an error productive of the greatest injury and injustice.

No one can be more sensible than I am of the great inconvenience, and therefore impropriety, of adopting a course which tends to make the law fluctuate according to the opinions of particular judges; but much must depend upon the nature of the question. In matters which do not affect existing rights or properties, to any great degree, but tend principally to influence the future transactions of mankind, it is generally more important that the rule of law should be settled, than that it should be theoretically correct; but when the question deeply affects the existing rights and interests of a large portion of the community, and the decisions impeached \*cannot, [\*618] to any great extent, have influenced the subsequent arrangements of parties affected by them—for such, I conceive, must be the case in the present instance—the object of reverting to the right rule is so great, and the inconvenience likely to arise from making the attempt comparatively so small, that a judge ought not to be easily deterred from it. Still, his discretion must be regulated by the weight of the authorities to which his opinion is opposed,

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and the length of time during which the opposite rule has appeared to be established.[1]

As to the weight of authority, the opinion of the Court of Exchequer in *Evans v. Rowe*, is strongly and decidedly in favor of the exemption ; and in *Chichester v. Sheldon* if there is the opinion, there is certainly not the judgment of Sir T. Plumer against it, and the same observation applies to *Ford v. Racster*. This is but little to weigh in the balance against a right regulated by statute, and enjoyed under it for 450 years ; but from the year 1823, the date of *Chichester v. Sheldon*, it may have been assumed that the law was correctly expounded in that case, though there certainly was no decision upon it. I cannot think that it is my duty upon this ground to decree to one man what I am satisfied is by law the property of another.

I am, therefore, satisfied that I am at liberty to act upon the opinion of the law, which, after a laborious examination of all the authorities, I have formed, and that the decisions are not such as to make it my duty to hold, against the positive enactments of the statute, 45 Edw. 3, that any *gros bois* or timber trees of above twenty years growth are liable to tithes.

[1] The duty of the judge in deciding between conflicting authorities is well summed up in the above paragraph. And in addition, and in elucidation, it may not be impertinent to repeat the words of another eminent equity judge. "I conceive it to be the duty of a judge to administer the law according to the evidences of it which are to be found in the authorities, and in the recognized practice of the profession. The inquiry before him is not what the law ought to be, but what it is ; and how it is to be applied to the particular cases which are under consideration. It may be lamented that the law upon any subject is in such a state as to induce eminent judges and writers to express their disapprobation of it, and their regret that they are bound to give it effect ; but it would be still more to be lamented, if judges should be found who thought themselves at liberty to declare the law according to their own fancies of what it ought to be. All stability would be lost, and the law, which should be administered upon clear and fixed principles, would be involved in uncertainty and confusion." Lord Langdale, M. R. *Butlin v. Fletcher*, 1 Keen, 379.

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\**Between* JAMES WALLWORTH the elder, and JOHN JOHNSTON, [\*619] on behalf of themselves and all other the Shareholders and Partners, of the Banking Company, called "THE IMPERIAL BANK OF ENGLAND" hereinafter mentioned, except such of the said Shareholders and Partners as are hereinafter named as defendants hereto, Plaintiffs; *and* JOHN HOLT, SAMUEL FOX, WILLIAM MARSTON, WILLIAM NICHOLSON, WILLIAM NUTTALL, SAMUEL WALLER, NICHOLAS PRICE WOOD, JOHN HAYWARD, THOMAS WALLER, RICHARD LAW, GEORGE ASPINALL, JOHN BRIDDON, JOHN MELLOR, RICHARD WILDING BATESON, JOHN WOODHEAD, THOMAS LABERY, JOHN SWALLOW, JOHN ABRAHAMS, THOMAS BARGE, JOHN JACKSON, SAMUEL BUCKLEY, JOHN MACFARLANE, WILLIAM RAWSON, CHRISTOPHER WEBSTER, JAMES BACKHOUSE, JOSEPH LEESE, HENRY BRIDGEMAN, HENRY PERSHOUSE, ISAAC BRAHAM, JOSEPH GILLHAM, ROBERT FAWKNER, JAMES LORD, CHARLES AXON, HENRY HOUGH, JAMES OGDEN, HENRY HOLLINGDRAKE, JOHN WYCH, ROBERT WHITTAKER, JOHN KENWORTHY, GEORGE KENWORTHY, WILLIAM SWIFT, JAMES OLDHAM, JOHN CHEETHAM, JOSEPH MIDDLETON, WILLIAM GAMMON, HENRY H. CRACKLOW, EDWIN PEMBERTON, JOHN HOLLINGWORTH, JAMES SMITH, RICHARD SHEPHERD, AND THOMAS BEARD HOLY, Defendants.

1840: August 7, 8. 1841: January 15.

Bill by some of the shareholders of an insolvent joint stock bank, established under the acts 7 G. 4, c. 46, and 3 & 4 W. 4, c. 83, on behalf of themselves and all other shareholders except the defendants, against the directors, some of whom had become bankrupt, and the trustees and public officer of the company, and certain shareholders, who were alleged to have not paid up their calls, praying that an account might be taken of all the partnership assets, and that such part as was outstanding might be got in by a receiver, and that the whole might be converted into money, and applied towards satisfaction of the partnership debts:

Demurrer for want of equity, want of parties, and multifariousness, overruled.

THIS was an appeal from an order of the Vice-Chancellor, allowing a demurrer to a bill, the allegations of which were, in substance, as follows: viz.

\*That in or about the month of July, 1836, a number of persons [\*620] exceeding six in number, entered into partnership together, for the purpose of carrying on the business of bankers at Manchester and elsewhere, pursuant to the provisions of the statutes 7 G. 4, c. 46,[1] and 3 & 4 W. 4, c. 83.

That the terms of the partnership were embodied in a deed of settlement, purporting to bear date the 4th of September, 1837, and to be made between John Holt, Samuel Waller, William Marston, William Nuttall, Samuel Fox, John Hilton Bayley, William Nicholson and Joseph Leese being the first general board of directors of the partnership, of the first part; the said

[1] As to the provisions of the stat. 7 Geo. 4, and the construction of it, see *Barker v. Buttress*, 7 Beav. 134.

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Joseph Leese and John Nuttall and Richard Law, the registered public officers of the partnership of the second part; John Hayward and Thomas Waller, the trustees of the partnership, of the third part; and the several other persons whose names were or should be thereunto subscribed, and who had sealed and delivered, and should from time to time seal and deliver the same, of the fourth part; by which it was witnessed, that the parties thereto did mutually declare and agree, to and with one another, that they would respectively observe, fulfil, and perform the several articles, regulations, clauses, and stipulations thereafter stated and contained, and numbered from 1 to 84, both inclusive.

[The bill set forth, at great length, the substance of very many of the articles or clauses of the deed of settlement; and then proceeded with the following statements, from which the nature of those articles or clauses will, it is conceived, sufficiently appear.]

That in the month of December, 1836, the company commenced [\*621] the business of bankers, at Manchester, \*under the firm of the Imperial Bank of England, and subsequently established branch banks at various places:

That the business and affairs of the company were managed by the directors; and that all conveyances of property in favor of the partnership, and all securities for its benefit, were made and taken in the names of the trustees:

That the names of the public officers of the partnership were, from time to time, duly returned to and registered at the stamp office in London, according to the requisitions of the act 7 G. 4, c. 46:

That the names and places of residence of the shareholders in the company were duly entered in a book provided for that purpose by the directors, called "the shareholders' register," and were, from time to time, duly returned to the stamp office in London, to be entered there in pursuance of the act of the 7 G. 4, and that such returns were duly entered there accordingly:

That previous to the month of April, 1839, the directors had duly called upon the registered shareholders to pay five several sums of 2*l.* per share, being altogether a moiety of the sum of 20*l.* per share, proposed to be subscribed as the entire capital of the company:

That such five several calls of 2*l.* per share had, before the month of April, 1839, been duly paid to or to the order of the directors, by the plaintiffs, on the several shares held by them, and that the calls had also, in like manner, been paid by the great majority of the registered shareholders on the several shares held by them respectively:

[\*622] \*That before the 30th of April, 1839, the company had sustained very considerable losses in the course of their business of bankers, and were unable to meet their payments, and that on the 30th of April, 1839, it was resolved by the directors, at a board meeting duly convened and held, that the company should suspend its payments, and that the branch

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banks should be written to to suspend their payments until further orders, and that a meeting of shareholders should be called for Wednesday, the 8th of May, then ensuing, to consider the propriety of resuming payment or winding up the affairs of the bank :

That the company, accordingly, on the 30th of April, 1839, suspended their payments, as well at the several branch banks as at the head bank at Manchester ; and that the whole business of the bank had since that time been entirely discontinued :

That a meeting of the shareholders was duly convened and held on the 8th of May, 1839, and that it was then resolved, unanimously, that in order to procure funds for payment of the notes of the bank in circulation, and of deposits, and other liabilities, a further call of 5*l.* per share should be immediately made ; and that, according to the provisions of the settlement deed, the directors should be desired to call a meeting as soon as possible, and then make such further call :

That two extraordinary meetings of the directors and shareholders of the bank were duly convened and held on the 27th of May, and the 13th of June, 1839, pursuant to the provisions for that purpose agreed upon on the formation of the partnership as before mentioned, and that at such meetings it was duly resolved and ordered that a further call of 5*l.* per share, making, \*with the calls then already made, the sum of 15*l.* on each original share of 20*l.*, should be forthwith made : [\*623]

That thereupon, under the authority of the before mentioned resolutions and orders, the directors, on the 15th of June, 1839, duly called upon the registered shareholders to pay the further call of 5*l.* per share :

That notice of such further call was duly given and sent to all the registered shareholders, at their several places of residence, as the same appeared in the shareholders' register, pursuant to the provisions for that purpose agreed upon on foundation of the partnership as before mentioned ; and that all other notices which, subsequent to the formation of the partnership, were required to be given or sent to the shareholders, were, in the same manner, duly given and sent to them :

That the further call of 5*l.* per share had been duly paid to or to the order of the directors by the plaintiffs, and also by the great majority of the registered shareholders :

That the company had, previous and down to the time when it suspended its payments, acted as a bank of issue ; and that at the time of its suspension a large number of notes of the bank was in circulation amongst the public, in respect of which the company was liable to a very great number of individuals in a large amount ; and that the company was, at the same time, indebted to various individuals in other sums, or otherwise liable to the payment of other sums, to a very large amount :

That upon and subsequent to the suspension of payment, several meetings were held of the directors and \*shareholders, and also of [\*624]

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the creditors of, and claimants upon the company, for the purpose of arranging some plan for winding up the company's affairs, and satisfying the creditors and claimants; and that many proposals had from time to time been since made for that purpose, but that no arrangement whatever had been come to on the subject, nor any plan for the settlement of the debts or claims of the creditors and claimants, or for the dissolution or winding up of the affairs of the partnership, ever formed or effected, except the resolutions and orders made and come to, as before mentioned, for the payment by the shareholders of a further call or sum of 5*l.* per share :

That no general or other meeting of the shareholders or creditors of the company, and the claimants thereon, had been held since the month of February, now last, nor any proceedings taken for the purpose of paying or satisfying the creditors and claimants out of the assets of the partnership since that time :

That John Holt, Samuel Fox, William Marston, William Nicholson, William Nuttall, Samuel Waller, and Nicholas Price Wood, seven of the defendants, were the directors, duly appointed, at the time the partnership stopped payment, and that no new appointment of directors had since been made :

That since the time when the company stopped payment, *fiats* in bankruptcy had been duly awarded and issued against Holt, Fox, Marston, Nuttall, Samuel Waller, and Wood, six of the directors, under which they had been severally found and declared bankrupts, and that assignees of their several and respective estates and effects had been duly appointed [*\*625*] under the bankruptcies, and that Nicholson was the only remaining director who had not become bankrupt :

That, under the provisions and stipulations entered into, as before mentioned, for carrying on the partnership business, the directors who had so become bankrupts were disqualified from continuing to act as directors, and that their offices as directors had, by their bankruptcy, become vacated, and that William Nicholson was the sole director now duly qualified to act in the management of the affairs of the company.

That, notwithstanding the bankruptcy of the six directors, they, together with Nicholson, had continued in possession of the assets of the partnership, and there was now in the possession or under the control of Nicholson and the six bankrupt directors, money, securities for money, bills of exchange, promissory notes, and other property belonging to the partnership to a very considerable amount and value in the whole :

That the trustees of the partnership had also considerable property, or securities upon property, for considerable amounts, belonging or due to the partnership vested in them ; and that large sums of money were also due to the partnership, as well from several of the shareholders thereof in respect of unpaid calls on their several shares, as also from numerous other individuals on various account :

That under the before stated provisions and stipulations for carrying on



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the partnership, three directors at least were necessary for transacting the business of the partnership, and that the trustees of the partnership refused to deal in any manner with the property and securities vested in them as aforesaid for the benefit of \*the partnership upon the authori- [\*626] ty of Nicholson, or of the several other persons who had ceased to be directors by reason of their bankruptcy, or any of them, and that the surviving registered public officer of the partnership also refused to act upon the authority aforesaid or otherwise; and that the several parties who were indebted to the partnership, whether upon bills of exchange or promissory notes or otherwise, also refused to pay the amount of their respective debts to the partnership, or any person on its behalf:

That contracts for the sale of property belonging to the partnership, and now vested in the trustees or other officers thereof, had been entered into with various persons, and that a considerable amount could now be realized by the partnership if such contracts could be completed, but that the parties with whom such contracts had been entered into refused, in consequence of the circumstances before stated, to complete the contracts:

That under the present constitution of the board of directors nothing effectual could be done by the board for getting in or securing the partnership property, or applying it in satisfaction of the partnership debts, so far as it would extend:

That, in fact, since the bankruptcy of the before mentioned directors, the outstanding assets of the partnership had been suffered to remain uncollected, and without the prosecution of any person authorized to interfere in the management or protection thereof; and that the value of such assets and of all the other partnership property had thereby been very greatly depreciated, and was still in a course of rapid depreciation:

\*That under the present circumstances of the company, no share- [\*627] holder duly qualified to act could be found who would accept the office of director, and it was in fact impossible to appoint duly qualified directors who would consent to act; and that the entire property of the partnership was, in consequence, in danger of being altogether lost or wasted:

That the entire partnership property of every description, including the amounts due from several of the shareholders, as afterwards more particularly mentioned, for the unpaid calls of 15*l.* per share, was wholly insufficient to pay and satisfy the full amount of the debts and liabilities of the partnership:

That such partnership property was nevertheless of very considerable amount, and if at once duly collected and converted into money would pay a considerable dividend on the full amount of the debts and liabilities of the partnership; and that by such application of the partnership property, the personal liability of the plaintiffs and of the other shareholders to the creditors and claimants upon the partnership would be diminished to the extent of the dividend realized and paid out of the property:

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That the whole of the property ought to be applied, so far as it would extend, in satisfying the debts and liabilities of the partnership, but that it could not, under the circumstances before stated, be got in or applied without the assistance of the court.

The bill charged that the number of the shareholders of the company was so great, and the rights and liabilities of such shareholders were so subject to change and fluctuation, by death or otherwise, that it was not [\*628] \*possible, without the greatest inconvenience, to make them parties to the suit; and that so to do would render it impossible, in fact, to prosecute the suit to a hearing, and that all the shareholders had a common interest in having the partnership property duly got in and applied, under the direction of the court, in satisfaction of the partnership debts; but that the plaintiffs were advised that the several parties after named as defendants were, under the circumstances after mentioned, necessary parties to the suit as such defendants; and in particular the plaintiffs charged that Holt, Fox, Marston, Nicholson, Nuttall, Samuel Waller, and Wood, the last appointed directors of the company, and who had now in their possession or under their control the partnership property, or some part of such property, were necessary parties as defendants to the suit.

The bill also charged that John Hayward and Thomas Waller, two other defendants, were the present trustees of the company, and that Thomas Waller had recently been declared a bankrupt, and that some part of the partnership property had vested in Hayward and Thomas Waller as such trustees, and that on that account they were also necessary parties as defendants to the suit; and it charged that Richard Law, another of the defendants, was the duly appointed and registered and sole surviving public officer of the company, and was on that account a necessary party as a defendant.

The bill further charged that among the several persons who entered into and became shareholders in the company, and who were duly registered at the stamp office in London as shareholders in the company, pursuant to the act of 7 G. 4, and who were now shareholders therein, and appeared as [\*629] such upon the register \*in the stamp office in London, were the several persons following; George Aspinall, John Briddon, John Mellor, Richard Wilding Bateson, and John Woodhead, all of Liverpool; Thomas Labery, John Swallow, John Abrahams, Thomas Barge, John Jackson, Samuel Buckley, John Macfarlane, William Rawson, Christopher Webster, James Backhouse, Joseph Leese, Henry Bridgeman, Henry Pershouse, Isaac Braham, and Joseph Gillham, all of Manchester; Robert Fawkner and James Lord, both of Salford; Charles Axon, Henry Hough, James Ogden, and Henry Hollingdrake, all of Stockport; John Wych, Robert Whittaker, John Kenworthy, George Kenworthy, William Swift, and James Oldham, of Ashton-under-Lyne; John Cheetham and Joseph Middleton, of Hyde; William Gammon, Henry H. Cracklow, Edwin Pemberton, John Hollingworth, and James Smith, all of Birmingham; Richard Shepherd, of Warrington; and

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Thomas Beard Holy, of Sheffield ; and that the several last-mentioned shareholders subscribed for and held a very large number of shares in the partnership, and that they had not paid up the full amount of the calls due and payable upon the several shares subscribed for and held by them in the company, and that considerable amounts were due from them respectively in respect of such calls, and that they were liable to be sued, and ought now to be sued for payment of the amounts so now due and owing from them respectively ; and that the directors and trustees of the partnership insisted that the several last mentioned shareholders were necessary parties as defendants to the suit, and that the several last mentioned shareholders pretended that some others of the shareholders in the company had not paid up their calls and ought also to be made parties to the suit ; but the bill charged the contrary of such pretences to be true, and that if there were any other shareholders who had not paid up their calls, the plaintiffs [\*630] were not acquainted with their names or places of residence, and that the several parties who should allege that there were such other shareholders, ought to set forth their names and residences, so as to enable the plaintiffs to amend their bill by making them parties thereto, if necessary.

The bill further charged that the several shareholders who were made defendants by reason of their not having paid up the full amount of the calls due upon their several shares, or some of such shareholders also pretended that they were, under the circumstances before mentioned, and under the present circumstances of the company, exonerated from paying the amount of calls due upon their several shares ; but the bill charged the contrary, and that even if the several defendants were exonerated from such payment, they would nevertheless by reason of their having held themselves out or allowed themselves to be held out to the public as registered shareholders or partners therein, down to the time of the partnership stopping payment, be personally liable to the creditors of claimants upon the partnership for the payment of the partnership debts ; and that they had consequently, in any event, an interest in the due application of the assets of the partnership amongst the several creditors thereof, and were necessary parties to the suit ; and the bill also charged that several defendants to the bill, or some of them, sometimes pretended that all the partners or shareholders in the company ought to be made personally defendants to the suit, by reason of their several and distinct interests in the surplus property, if any, of the partnership, after payment of the debts and liabilities of the partnership ; whereas the bill charged that it was well known to all the defendants, as the fact was, that [\*631] the whole of the partnership assets of every description, including the several sums now in arrear for calls upon the shares of some of the shareholders as before mentioned, was altogether insufficient to pay and satisfy the full amount of the debts and liabilities of the partnership remaining after payment and satisfaction of such debts and liabilities ; and that Holt, Fox, Marston, Nicholson, Nuttall, Samuel Waller, Wood, Hayward, Tho-

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mas Waller, and Law, the before mentioned directors, trustees, and public officer of the partnership, ought, but refused, to set forth a statement and account of the assets belonging to the partnership now in their possession and under their control, or vested in them respectively, with the short and material description and particulars of such assets.

The bill prayed that an account might be taken of all the property of the company, including such several amounts as might now be due from the shareholders of the company, or any of them in respect of unpaid calls upon the several shares held by them respectively; and that some proper person might be appointed to receive such property, in paying the amount of such unpaid calls; and that such receiver might be at liberty to use the name of the registered public officer, or the name of such other officer or officers, of the partnership as might be necessary, in any proceedings, whether at law or otherwise, for recovering or enforcing payment of the property, including the unpaid calls, or any part thereof; and that the defendants, Holt, Fox, Marston, Nicholson, Nuttall, Samuel Waller, Wood, Hayward, Thomas Waller, and Law, might be decreed to deliver up, and to duly assign or otherwise assure to the receiver, all moneys and securities for money, property, and [\*632] effects whatsoever of or belonging to the partnership now in their respective possession, or under their respective control; and all deeds, evidences of title, books, accounts, papers, documents, and writings in their respective possession or power, or in anywise relating thereto; and that such parts of the property of the partnership as required to be sold might be sold under the direction of the court; and that all proper parties might be ordered to join in such sale, and that all proper directions might be given for effectuating the same; and that the last named defendants, and all other the officers and servants of the company might be restrained by injunction from receiving, or in any way possessing themselves of, or intermeddling or dealing with, the property of the partnership, or any part thereof now outstanding, and from assigning or parting with any part thereof now in their possession or power, otherwise than to the receiver, or under the direction of the court; and that an account might be taken of the debts and liabilities due and owing from the partnership, or to which the partnership was subject; and that the property of the partnership, including the amount of the unpaid calls, might be duly and properly applied towards payment and satisfaction of the several debts and liabilities, so far as the same would extend for that purpose; and that all such proper directions might be given, and accounts taken, and inquiries directed, as might be necessary for the purposes before mentioned.

To this bill the defendants George Aspinall and Richard Wilding Bateson demurred for want of equity, want of parties, and multifariousness, insisting that all the shareholders of the bank ought to be parties, and that the assignees in bankruptcy of Thomas Waller, John Holt, Samuel Fox, William Marston, William Nuttall, Samuel Waller, and Nicholas Price Wood ought to be made parties.

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\*The Vice-Chancellor having allowed the demurrer, on the ground [\*633] of want of equity, the plaintiffs now appealed against his honor's order.

Mr. *Richards* and Mr. *Rolt*, in support of the appeal.

Mr. *Jacob*, Mr. *Wigram* and Mr. *Sharpe*, in support of the demurrer, contended that the court could not, in such a suit as the present, give such limited relief as was asked by the bill; and they maintained that the plaintiffs had no right arbitrarily to select as defendants, from amongst the shareholders of the company, those particular persons against whom this suit was brought, and whose position, with regard to the affairs of the company, did not differ from the position of many of the other shareholders on whose behalf the suit professed to be instituted; and they suggested that the real object of the bill was to force these particular persons into certain terms. They submitted that either all the shareholders other than the two plaintiffs, or else the directors alone should have been made defendants, and that the necessity of bringing all the shareholders before the court was shown by the statement contained in the bill, that the assets of the company were not sufficient to pay its debts; the consequence of which was, that all the shareholders must be made to contribute to their payment. They further insisted, that the allegations of the bill were not sufficiently precise; and they referred to *Long v. Yonge*,<sup>(a)</sup> *Walburn v. Ingilby*,<sup>(b)</sup> and *Richardson v. The Bank of England*.<sup>(c)</sup>

Mr. *Richards*, in reply.

\*1841; Jan. 15.—THE LORD CHANCELLOR:—The demurrer in [\*634] this case was allowed by the Vice-Chancellor for want of equity,[2] and upon the ground, as I was informed in the argument, that the court could not give relief of the limited kind prayed by the bill; but, upon this appeal, all the grounds in support of the demurrer are open to the defendants, viz., want of equity, want of parties, and multifariousness.[3] In support of the last, I have not been able to discover any thing. I shall, therefore, take no further notice of it.

The case stated by the bill, which is filed by the plaintiffs on behalf of themselves and all other the shareholders and partners of the banking company called the Imperial Bank of England, except those who are made defendants, is shortly this: that they are shareholders, and have paid all the calls made, which amount to 15*l.* per share; that the business of the company has been suspended since 1839, but that it has not been dissolved; that

(a) 2 Sim. 369.

(b) 1 Mylne & Keen, 61. [S. C. Coop. Sel. Cas. 270.]

(c) Mylne & Craig, 165.

[2] The Editor has not met with any report of the case when before the Vice-Chancellor.

[3] Strictly and correctly speaking there was here not an appeal, but a rehearing of the cause before a superior judge of the same court, and therefore the Chancellor might say, that "all the grounds in support of the demurrer are open to the defendants." But had the application been to a higher and distinct tribunal, it would be a question whether the court *ad quam* could act upon any matter not discussed before, and adjudicated upon, by the court *a qua*.



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large debts are due by the company, for which they and the other shareholders are liable, and that there are considerable assets in the hands of the directors and trustees, though not equal to the debts; that all the directors, except one, have become bankrupts, and have thereby, by their regulations, become incapable of acting, and that the trustees refuse to act; and that the other defendants are the only shareholders who have not paid their calls; and it therefore prays for the assistance of this court to relieve them from this difficulty, by causing the assets of the company to be realized, and the debts to be paid; and for this purpose a receiver may be appointed, and authorized to sue for calls unpaid, and other debts due to the company, in the name of the registered officer under the 7 G. 4, c. 46, who is one of the defendants.

[\*635] \*When it is said that the court cannot give relief of this limited kind, it is, I presume, meant, that the bill ought to have prayed a dissolution, and a final winding up of the affairs of the company.[4] How far this court will interfere between partners, except in cases of dissolution, has been the subject of much difference of opinion, upon which it is not my purpose to say any thing beyond what is necessary for the decision of this case; but there are strong authorities for holding that to a bill praying a dissolution all the partners must be parties;[5] and this bill alleges that they are so numerous as to make that impossible. The result, therefore, of these two rules would be,—the one binding the court to withhold its jurisdiction except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it;—that the door of this court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law; for, as I have said

[4] On a motion for an injunction and receiver, by one partner against his copartner, Lord Langdale, M. R. said: "The plaintiff is not entitled to the order for which he asks, unless he has shown that he had a right to dissolve the partnership, by notice under the deed, or has shown facts which if approved at the hearing, would entitle him to a decree for a dissolution." But there being such facts, the motion was granted. *Smith v. Jeyes*, 4 Beav. 503.

[5] "What the plaintiff asks by his bill is in fact a dissolution of the company. Although the company has suspended its business, it is still a company: and it is new to me that, where a dissolution is asked, it can be had in the absence of any of the members." Shadwell, V. C. *Abraham v. Honey*, (Nov. 1843,) 13 Sim. 581. But in a little later case, (Jan. 1844,) Lord Langdale said: "At one time, the court would not entertain a suit between parties in relation to partnership transactions except upon a bill to wind up the partnership. That is not now the rule of the court; for I think, and the cases which have been referred to corroborate that view, that the court will, as between partners, entertain a bill to settle a question which may arise between them, without proceeding to wind up the concerns and affairs of the partnership." *Richardson v. Hastings*, 7 Beav. 307; and see S. C. id. 328; 9 Sim. 609, n. 1; 1 Story's Eq. § 671. The court ought to interfere between partners wherever the act complained of is one that tends to the destruction of the partnership property, although a dissolution be not prayed for. *Miles v. Thomas*, 9 Sim. 606. *Fairthorne v. Weston*, 3 Hare, 387, 391.



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upon other occasions,(a) I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. This has always been the principle of this court, though not at all times sufficiently attended to. It is the ground upon which the court has, in many cases, dispensed with the presence of parties who would, "according to the general practice, have been necessary [\*636] parties.[6]

In *Cockburn v. Thompson*,(b) Lord Eldon says, "A general rule, established for the convenient administration of justice, must not be adhered to in cases in which, consistently with practical convenience, it is incapable of application;" and again, "The difficulty must be overcome upon this principle, that it is better to go as far as possible towards justice than to deny it altogether." If, therefore, it were necessary to go much further than it is, in opposition to some highly sanctioned opinions, in order to open the door of justice in this court to those who cannot obtain it elsewhere, I should not

(a) See *Mare v. Malachy*, 1 Mylne & Craig, 559; *Taylor v. Salmon*, 4 Mylne & Craig, 134.

(b) 16 Ves. 321, see pp. 326, 329

[6] In a later case, (Feb. 1844,) which arose upon a demurrer to a bill for want of parties, Lord Langdale, M. R., said: "All cases of this kind are attended with some degree of difficulty, and the conclusion to be arrived at depends on rather nice circumstances. The arguments in support of a demurrer of this kind have generally a very strong foundation, because cases of this kind always deviate from two old and general rules of the court; one is, that all persons interested in the subject matter of the litigation ought to be parties; the other is, that the court endeavors to do complete justice in every case, so that the matters involved in the suit may not be left open to future litigation. Now the present bill is, to a certain extent, a departure from both these rules, because it is proposed to be prosecuted in the absence of parties interested in the suit; and it also proposes that the sums to be recovered should be left at their disposal if they can agree, and if not, then that they may be left for future litigation. However, exceptions to the two rules which I have stated, have at all times been sanctioned. I recollect a treatise, in which one of the chapters was headed, 'In what cases necessary parties may be dispensed with.' The assumption that necessity could admit of any qualification may seem to imply that exceptions to the ordinary rule were admitted with difficulty. It has however become necessary to extend the cases of exception, so as to keep pace with the progress and complications of the transactions of mankind; and every body who reads what Lord Cottenham has said on more than one occasion, must be perfectly satisfied with the justice of his observation, and see how necessary it is for this court, acting always within the limits of its jurisdiction, by an application of its powers so necessary for the administration of justice, to adapt its forms of proceeding to the altered circumstances of society in our own times, and modify its rules so as to meet the changes of circumstances under which it is, at the present day, called upon to administer justice. In no class of cases has the extension been more frequent than in cases like the present." *Richardson v. Hastings*, 7 Beav. 326, cited and stated *infra*, n. 7. "Lord Cottenham in *Attwood v. Smith*, [not reported,] after saying that the right course was to bring all parties before the court, observed, that courts of justice are bound to have regard to the mode in which the affairs of mankind are conducted; and when, in consequence of the mode of dealing, it would be impossible to work out justice if the rule requiring all persons to be present were not departed from, it must be relaxed rather than be allowed to stand as an obstruction to justice." *Wigram, V. C. Holland v. Baker*, 3 Hare, 74 *Foss v. Hurbottle*, 2 Hare, 492. 2 Sim. 387, n. 1.

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shrink from the responsibility of doing so ; but, in this particular case, notwithstanding the opinions to which I have referred, it will be found that there is much more of authority in support of the equity claimed by this bill than there is against it.

It is true that the bill does not pray for a dissolution, and that it states the company to be still subsisting ; but it does not pray for an account of partnership dealings and transactions, for the purpose of obtaining the share of profits due to the plaintiffs, which seems to be the case contemplated in the opinions to which I have referred ; but its object is to have the common assets realized and applied to their legitimate purpose, in order that the plaintiffs may be relieved from the responsibility to which they are exposed, and which is contrary to the provisions of their common contract, and to every principle of justice. But whether the interest of the plaintiffs in right of

which they sue arises from such responsibility or from any other  
[\*637] cause cannot be material ; the question being, whether some part-

ners, having an interest in the application of the partnership property, are entitled, on behalf of themselves and the other partners, except the defendants, to sue such remaining partners in this court for that purpose, pending the subsistence of the partnership ; and if it shall appear that such a suit may be maintained by some partners on behalf of themselves and others similarly circumstanced against other persons, whether trustees and agents for the company or strangers being possessed of property of the company, it may be asked why the same right of suit should not exist when the party in possession of such property happens also to be a partner or shareholder ?

In *Chancey v. May*,<sup>(a)</sup> the defendants were partners. In the *Widows' Case*, before Lord Thurlow, cited by Lord Eldon,<sup>(b)</sup> the bill was on behalf of the plaintiffs and all others in the same interest, and sought to provide funds for a subsisting establishment. In *Knowles v. Houghton*, 11th July, 1805, reported in Vesey,<sup>(c)</sup> but more fully in Collyer on the Law of Partnership,<sup>(d)</sup> the bill prayed an account of partnership transactions, and that the partnership might be established ; and the decree directed an account of the brokerage business, and to ascertain what, if any thing, was due to the plaintiff in respect thereof ; and the master was to inquire whether the partnership between the plaintiff and the defendant had at any time, and when, been dissolved ; showing that the court did not consider the dissolution of the partnership as a preliminary necessary before directing the account. In

[\*638] *Cockburn v. Thompson*,<sup>(e)</sup> the bill prayed a dissolution ; but it was filed by certain proprietors on behalf of themselves and others, and Lord Eldon overruled the objection that the others were not parties. In *Hichens v. Congreve*,<sup>(g)</sup> the bill was on behalf of the plaintiff and the other shareholders, against certain shareholders who were also directors, not praying a dissolution, but seeking only the repayment to the company of certain

(a) Prec. Ch. 592.

(d) P. 198, 2d edit.

(b) 17 Ves. 15.

(e) 16 Ves. 321.

(c) 11 Ves. 168.

(g) 4 Russ. 562.

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funds alleged to have been improperly abstracted from the partnership property by the defendants; and Sir Anthony Hart overruled a demurrer, and his decision was affirmed by Lord Lyndhurst. In *Walburn v. Ingilby*,<sup>(a)</sup> the bill did not pray a dissolution of partnership, and Lord Brougham, in allowing the demurrer upon other grounds, stated that it could not be supported upon the ground of want of parties, because a dissolution was not prayed.

In *Taylor v. Salmon*,<sup>(b)</sup> the suit was by some shareholders, on behalf of themselves and others, against Salmon, also a shareholder, to recover property claimed by the company, which he had appropriated to himself; and the Vice-Chancellor decreed for the plaintiff, which was affirmed on appeal. The bill did not pray a dissolution, and the company was a subsisting and continuing partnership. That case and *Hichens v. Congreve* differ from the present in this only, that in those cases the partnerships were flourishing and likely to continue, whereas in the present, though not dissolved, it is unable to carry on the purposes for which it was formed, an inability to be attributed in part to the withholding that property which this bill seeks to recover. So far this case approximates to those in which the partnership has been dissolved; as to which it is \*admitted that this court [\*639] exercises its jurisdiction. This case also differs from the two last mentioned cases in this, that the difficulty in which the plaintiffs are placed, and the consequent necessity for the assistance of this court, is greater in this case;—no reason, certainly, for withholding that assistance.

How far the principle upon which these cases have proceeded is consistent with the doctrine in *Loscombe v. Russell*,<sup>(c)</sup> “that in occasional breaches of contract between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the court stands nenter,” will be to be considered if the case should arise. It is not necessary to express any opinion as to that in the present case; but it may be suggested that the supposed rule that the court will not direct an account of partnership dealings and transactions, except as consequent upon a dissolution, though true in some cases, and to a certain extent, has been supposed to be more generally applicable than it is upon authority, or ought to be upon principle. It is, however, certain that this supposed rule is directly opposed to the decision of Sir J. Leach in *Harrison v. Armitage*,<sup>(d)</sup> and *Richards v. Davies*.<sup>(e)</sup>

Having referred to so many cases in which suits similar to the present have been maintained by some partners on behalf of themselves and others, it is scarcely necessary to say any thing as to the objection for want of parties: and as to the assignees of those shareholders who have become bankrupts, those assignees are now shareholders in their places, for the purpose of any interest they have in the property of the \*company; [\*640]

(a) 1 Mylne & Keen, 61. [S. C. Coop. Sel. Cas. 270.]

(c) 4 Sim. 8, see p. 11.

(d) 4 Mad. 143.

(b) 4 Mylne & Craig, 134.

(e) 2 Russ. & Mylne, 347.

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and, as such, are included in the number of those on whose behalf the suit is instituted. A similar objection was raised and overruled in *Taylor v. Salmon*, as to the shares of Salmon.

Upon the authority of the cases to which I have referred, and of the principle to which I have alluded, if it be necessary to resort to it, I am of opinion that the demurrer cannot be supported; and that the usual order, overruling a demurrer, must be substituted for that pronounced by the Vice-Chancellor.[7]

[7] By the rules of a club, the bankers were alone authorized to receive money on account of the club. Some of the members subscribed, and purchased the furniture, which by deed executed by the subscribers was vested in the plaintiff, in trust to repay the amount subscribed, and to pay the surplus to the committee for the benefit of the club. The club becoming embarrassed was afterwards dissolved, and the committee were authorized to wind up the affairs. Hastings and Emly two of the committee, sold the furniture, and alone received the produce, together with other general assets of the club. A bill was filed by the plaintiff on behalf &c., against Hastings and Emly, and another member of the club, to recover the moneys in the hands of H. and E. and praying that the furniture money might be paid to the plaintiff on the trusts of the deed, or otherwise as the court might direct, and that the general assets recovered might be paid to the bankers or otherwise, &c. On demurrer it was held that the bill was not defective for want of parties, and that neither the other parties to the deed, nor the other members of the club were necessary parties. Lord Langdale, M. R. "It was at one time supposed that in consequence of the general rule that complete justice must be done with respect to the subject matter, the court could not, and would not, interfere at all as between partners, unless the partnership was to be dissolved and finally wound up and settled; and there are several conflicting cases in the books on that subject, different judges having entertained very strong opinions and very different views on that question. I noticed on the former occasion, [*sup. n. 5.*] that it now appears very clear that there is no such rule. It has been decided that in a continuing partnership, if a few have an interest in a particular subject adverse to all the rest, and claim for themselves the benefit of that interest, a bill may be filed against those few by one or more partners on behalf of themselves and all the rest. That is a remarkable instance of a case where all persons interested are not brought before the court: however, it is not much more remarkable than the cases where one creditor, or one legatee is permitted to sue on behalf of himself and many other persons, and some other similar cases. The court has even gone to this extent; in the case of an insolvent partnership not formally dissolved it has permitted a bill to be filed by one or more on behalf of the rest against the governing body, to have the assets collected, and applied, as far as they would go, towards the discharge of the debts; and that without seeking to ascertain the rights and liabilities of the parties between themselves, and consequently leaving litigation as between those parties entirely open after the debts have been paid: that is, it has sanctioned a suit which sought nothing but to compel a satisfaction, *pro tanto*, of the partnership debts, as far as the deficient assets would extend, and then leave all the members of the partnership exposed to such litigation as the unsatisfied creditors might choose to adopt for the recovery of the remainder of their debts; and also leave the partners liable, as amongst themselves, to such suits for contribution as the particular circumstances of the case might render necessary. In this case it is alleged that the two defendants Hastings and Emly, have possessed themselves of property belonging to this club, which I must consider as a partnership; that one of the sums, namely, the furniture money, is subject to a peculiar trust, and the other moneys are general assets of the partnership. They have possessed themselves of these sums of money, and refuse to account for them. This bill desires to recover them, not for the purpose of distribution by the court through the means of this suit, but for the purpose of bringing them within the control of the governing body of the partnership, in order that they may be applied under their control, according to the rights of the parties. That seems to me to be the nature of the bill. Can that be done? The plaintiff and all the other members,

1839.—Wordsworth v. Wood.

## \*WORDSWORTH v. WOOD.

[\*641]

1839: June 26; July 5, 6; December 4.

A testator, after disposing of certain property, gave to his wife, for her life only, all his remaining estates, and then proceeded in the following words:—"As also I leave, give, and bequeath to my said dear wife all my capital in trade, with the three quarters of the profits arising therefrom, for her life; but nevertheless in trust, at her death, for my then surviving children, share and share alike; independent of the rental of my said estates which I give and bequeath to my surviving female children, to be paid to them as follows, by my executor J. C. W., or his heirs or assigns," &c. The testator then, after directing his executor to pay such rents at certain particular times, proceeded thus:—"On the decease of any of the children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children, and from the last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them. But be it remembered, that my daughter Mrs. Eliza J. is exempt from any benefit arising from this will, the said Mrs. J. having had her share of my property at her marriage."

One of the daughters, having survived the testator, married, and afterwards died, in the lifetime of his widow, leaving children. Held, that such children did not become entitled to their mother's share.

THE will of Joseph Wood, dated the 23d of October, 1827, after disposing of certain particular parts of his property, proceeded in the following words:—

except these two defendants, must have an interest in having the money, which the demurrer admits to be in the defendant's possession, brought within the control of the club; that is the common interest of all. How this money when it is brought within the control of the club, ought to be applied is another matter. To ask to recover it and place it within the control of the club, and leave it there subject to litigation, is asking no more than was done in the case of *Wallworth v. Holt*, where matters were thus left. If then, it is for the common benefit of all, except the two defendants, that those funds should be recovered, why should it not be done? It is said that this is a case of dissolution. Very true; and this shows that there ought to be a winding up and a final settlement. But how is it with a partnership after a dissolution, and before the affairs of the partnership are wound up? The mutual connection between the partners is not dissolved with the dissolution of the partnership, because it must continue for the purpose of collecting the assets and winding up the partnership; and until these matters are all closed, there is a *quasi* partnership, a mutual interest between the parties. In the present state of the record the question is, whether the defendants are to answer. I cannot determine at this time whether, in consequence of what may appear in the answer, it may not hereafter be absolutely necessary to make the parties referred to and other persons parties. Taking the statements of the bill as they now stand admitted by the demurrer, it does not appear to me that I ought to allow the present demurrer; but overruling it, I beg to have it clearly understood, that it may appear hereafter that it is quite necessary not only to make the persons now pointed out, but other persons parties; for after this demurrer is overruled, the defendants may still raise the same objection in their answer." *Richardson v. Hastings*, 7 Beav. 323; S. C. id. 301; *sup.* n. 6. As to the general rule requiring all parties in interest to be parties to the suit, see *Mare v. Malacky*, 1 Myl. & Cr. 559; *Bayley v. Best*, 1 Russ. & M. 659; *Hoxie v. Carr*, 1 Sumn. 173; *Hallett v. Hallett*, 2 Paige, 18, 19; *Howley v. Cramer*, 4 Cow. 728; *Evans v. Stokes*, 1 Keen, 24; *Ferry v. Stephenson*, 1 Beav. 42; *Haydon v. Bell*, 1 Beav. 343, and n. 1, *ibid*; *Brooks v. Stuart*, id. 512; *Bainbridge v. Burton*, 2 Beav. 539; *Baldwin v. Lawrence*, 2 Sim. & Stu. 19, 26, n. 1; *Blain v. Agar*, 1 Sim. 44, and n. 1, *ibid*; *Lowry v. Fulton*, 9 Sim. 114, and n. 1, *ibid*; *Mangle v. Grand Collier Dock Co.*, 10 Sim. 541; *Perry v. Knott*, 4 Beav. 179; *Eades v. Harris*, 1 Yo. & Coll. C. C. 230; *Wardell v. Claxton*, id. 265; *Hawkins v. Hawkins*, 1 Hare, 543;



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“ And now I do give and bequeath to my dear wife Mary Wood, in trust for her life only, all my remaining estates, freeholds, leaseholds, ground rents, and reversions, rent charges, plate, linen, and the household furniture in the houses at Westminster and Park House, parish of Hayes, county of Middlesex, with the pictures, and any particular article she may be desirous of from my estates in Devonshire; as also I leave, give, and bequeath to my said dear wife all my capital in trade, with the three quarters of the profits arising therefrom, for her life, but nevertheless in trust, at her death, for my then surviving children, share and share alike; independent of the rental of my said estates, which I give and bequeath to my surviving female children, to be paid them as follows by my executor, Joseph Carter Wood, or his heirs or assigns; that is to say, the whole rents and produce, share and share alike, of all such freehold, leasehold, ground rents, and reversions, rent charges, plate, and household furniture, as before mentioned; but to have no [\*642] power to sell, mortgage, or in any way whatsoever to incumber the same; on the contrary, the rents of which I direct may be received from my executor Joseph Carter Wood, and paid by him to them one month after each quarter day, that is to say, on the 25th day of January, the 25th day of April, the 24th of July, and 29th of October in each year; so carrying the balance forward to the next quarter. On the decease of any of the children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children, and from the last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them. But be it remembered, that my daughter Mrs. Eliza Johnstone is exempt from any benefit arising from this will, the said Mrs. Johnstone having had her share of my property at her marriage, namely, an annuity of 200*l.* per annum, which I do hereby likewise provide for to be paid quarterly from my share of three quarters of the profits of the Westminster brewery; but I should recommend my executors to make a sinking fund, immediately after my death, to raise a sum of 4000*l.*, which, when raised, I desire may be paid to Capt. Hope Johnstone, and so redeem the annuity, that the estate may be free to fulfil my desires and requests in this my last will and testament contained.”

The testator made a codicil to his will in the following words:—“ And be it understood, the horses requested to be sold in Devonshire does not include

*Roberts v. Marchant*, id. 549; *Holland v. Baker*, 3 Hare, 68. When dispensed with; *Walburn v. Ingilby*, 1 Myl. & K. 77; *Wendell v. Van Rensselaer*, 1 Johns. Ch. Rep. 349; *Shuttleworth v. Howarth*, ante, 495; *Hallett v. Hallett*, *ubi sup.*; *Wakeman v. Grover*, 4 Paige, 23; *Harrison v. Urann*, 1 Story's Rep. 64; *Harvey v. Harvey*, 4 Beav. 215, 220; *Eades v. Harris*, *ubi sup.*; *Blain v. Agar*, 2 Sim. 289. As to bill on behalf of plaintiff and others, see *Taylor v. Salmon*, ante, 142, and cases cited n. 1, *ibid.*; *Milligan v. Mitchell*, 3 Myl. & Cr. 84; *Dias v. Bouchard*, 10 Paige, 447; *Harvey v. Harvey*, *ubi sup.*; *Baldwin v. Lawrence*, 2 Sim. & Sta. 19, 26, and n. 1, *ibid.*; *Benson v. Heathorn*, 1 Yo. & Coll. C. C. 326.



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the carriage horses : and also, if my executors should think proper to buy up Eliza Johnstone's annuity, the 4000*l.* so paid must be secured by trustees to the said Eliza Johnstone, for her own sole use and benefit, independent of her husband, and at her death to her children."

\*The bill was filed by the infant children of one of the testator's [\*643] daughters who had survived him, and had afterwards married, but had died in the lifetime of his widow, and the question which came before the court, and which arose upon the demurrer of some of the defendants, was, whether, under the terms of the will, the plaintiffs were entitled to the share of their mother, as one of the testator's "surviving female children."

The demurrer having been allowed by the Master of the Rolls,(a) the plaintiffs appealed from his lordship's decision.

Mr. Tinney, Mr. Jacob, Mr. Hodgson, and Mr. Keene, in support of the appeal, contended that the word "surviving" applied to the death of the testator, and not to the death of the widow. They commented with great particularity on the will itself, and also on the codicil, and on the following cases ; *Doe dem. Long v. Prigg*,(b) *Giles v. Giles*,(c) *Bone v. Cooke*,(d) *Smith v. Smith*,(e) *Le Jeune v. Le Jeune*,(g) *Bowen v. Scowcroft*,(h) and the cases collected in 2 Roper on Legacies, p. 338, *et seq.*

Mr. Knight Bruce, Mr. Stuart, and Mr. Bethell, *contra*, referred to *Christopherson v. Naylor*,(i) *Thornhill v. Thornhill*,(k) *Butter v. Ommaney*,(l) *Waugh v. Waugh*,(m) *Tytherleigh v. Harbin*,(n) *Daniell v. Daniell*,(o) *Newton v. Ayscough*,(p) *Cripps v. Wolcott*,(q) *Perry v. Woods*,(r) *Home v. Pillans*.(s)

\*Mr. Tinney, in reply, referred to the cases collected in Fearne's [\*644] Contingent Remainders, page 242, particularly *Webb v. Hearing* ;(t) and to *Tucker v. Harris*.(u)

**Dec. 4.—THE LORD CHANCELLOR :—**The claimants are the children of one of the testator's daughters who survived him, but died in the lifetime of the widow. They cannot, therefore, contend that any interest vested in the daughter by her surviving her mother ; and yet if the period to which the survivorship refers be the death of the father, the reasonable construction of that which is called the clause of substitution would be to give to the children what the parent would have taken had she lived, that is, substitute the children of a child dying, in the testator's lifetime, in its parent's place.

For the plaintiffs it was contended, that whether the term "surviving" ap-

(a) See 2 Beav. 25.

(d) 13 Price, 332.

(h) 2 Yo. & Coll. 640.

(l) 4 Ross. 70.

(o) 6 Ves. 297.

(r) 3 Ves. 204.

(u) 5 Sim. 538.

(b) 8 B. & C. 231.

(e) 8 Sim. 353.

(i) 1 Mer. 320.

(m) 2 Mylne & Keen, 41.

(p) 19 Ves. 534.

(s) 2 Mylne & Keen, 15.

(c) 8 Sim. 360.

(g) 2 Keen, 701.

(k) 4 Madd. 377.

(n) 6 Sim 329.

(q) 4 Madd. 11.

(t) Cro. Jac. 415.

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plied to the death of the testator, or of the tenant for life, there was, a sufficient manifestation of intention to substitute the children of a child dying in the place of its parent; but, if that were so, it would be necessary to show that the class to take was to consist of the testator's children, and of the children of such as might be dead; and it would be equally important to fix the time at which the component parts of the class were to be ascertained. Substitution assumes that the party dying was an object of the gift.

I do not find, in this will, what is properly called a substitution, [\*645] that is, placing the child in the place of its "deceased parent as donee of the gift, but a modification and limitation of the gift to the child. The gift is to "surviving female children," with directions as to the manner of their enjoying it, and then the will proceeds; "On" (not "if" or "in case of" but "on") "the decease of any of the children,"—and provision is then made for the event of the child so dying leaving or not leaving children; all which assumes that the gift had taken effect in the child, and is not the substitution of a new donee in the place of a donee dying: and this consideration displaces another argument relied upon by some of the counsel for the plaintiff, that this disposition amounts only to a gift to two tenants for life in succession, with an ultimate gift, and that such ultimate gift cannot be defeated by the death of the second tenant for life, living the first; whereas, there is, indeed, a tenancy for life of the whole fund, but the ultimate gift is to a class, with a modification and limitation of the gift to the different members of the class; so that the question must come to this: At what time is this class to be ascertained? or, in other words, to what period does the term "surviving" refer?

In considering this question, it will not, I think, be necessary to come to any conclusion as to whether the decision of Sir J. Leach in *Cripps v. Wolcott*,(a) or the cases to which it is opposed ought to be preferred; because I find circumstances in this case which, according to other and earlier authorities, are held sufficient to lead to the conclusion that the term "surviving" must be construed to mean surviving the tenant for life.

To his wife the testator gives a direct estate for life; and it is only [\*646] after her death that the trust commences "for the children; and the gift to them is to be found in the direction to pay the income to them, in certain modes, necessarily assuming them to be then alive, and, therefore, excluding any who might have died before. Upon this ground, the survivorship was held to refer to the period of distribution, in *Brograve v. Winder*,(b) *Newton v. Ayscough*,(c) and *Hoghton v. Whitgreave*.(d)

There is another circumstance, in this case, strongly leading to the same conclusion. In the preceding sentence, the testator gives, after his wife's death, part of his property to his then surviving children, and the rental of his estates he gives to his surviving female children. It is admitted that no

(a) 4 Madd. 11.

(b) 2 Ves. jun. 634.

(c) 19 Ves. 534.

(d) 1 Jac. &amp; W. 146.

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daughter could take part of the first gift who did not survive the widow ; and I think, with Sir W. Grant in *Daniell v. Daniell*,<sup>(a)</sup> that it is a reasonable conclusion that he intended the same daughter to take both ; the apparent object of the separation of the gift being to include the sons in the first gift, and not to introduce a new class of daughters in the second.

I think, therefore, that the decision of the Master of the Rolls is sound in principle, and supported by authority.

*Doe dem. Long v. Prigg*<sup>(b)</sup> was much relied upon for the plaintiffs. Upon the general question, it is a most important authority ; but it has none of those circumstances which take this case out of the general rule.

Order affirmed : no costs.[1]

\*DILLON v. COPPIN.

[\*647]

1839 : December 14, 24.

A father, being seized of certain freehold property, and being possessed of certain East India stock, and shares in the Globe Insurance Company, by a deed poll, reciting that, with a view of making some provision for Mrs. C., one of his married daughters, and her husband and children, he had determined to convey, assign, and transfer the freehold property, stock, and shares in manner after stated, and that he was about to transfer the stock in order to effect his intention thereafter declared in respect of the same stock, proceeded to make known that, in consideration of natural love and affection, and of 10s., he released the freehold property to his daughter's husband (in whose favor he had executed a lease for a year,) to hold to him in fee, to the use of his (the settlor's) daughter for life, remainder to her husband for life, remainder to her children as tenants in common in fee. And he further made known that, for settling and assuring the stock and the shares, and for effecting his intention in that behalf, and for the considerations before expressed, he thereby granted, bargained, sold, and assigned the stock and shares to his daughter, her executors, &c., with full power, in his name or otherwise, either personally or by attorney, to recover and receive such part of the premises as a mere assignment would not enable her to recover or receive : to hold to her, her executors, &c. for her separate use ; and in case her husband should survive her, then with power for him to receive the dividends for his life, and after the death of the survivor of them, then for the benefit of their children equally. And by the same deed poll the settlor directed his real and personal representative to make and execute all acts, conveyances, transfers, or other assurances for more effectually conveying, transferring, or otherwise assuring the premises. This deed (as well as the lease for a year) was sealed and delivered by the intestate in the usual way, but he retained it in his possession until

(a) 6 Ves. 297.

(b) 8 B. & C. 231.

[1] The testator gave his real and personal estate to his wife for life, and after her death the residue to be equally divided between her brothers and sisters, and in case any of them should be dead at the time of her decease, leaving issue, such issue should stand in their parents' place ; it was held, first, that no brother or sister who died before the date of the will was capable of taking under the bequest, and therefore, the issue of any brother or sister who was dead before the date of the will, could not take by substitution ; secondly, that it was not an original and substantive gift to the issue of those brothers and sisters who were dead at the death of the wife ; and thirdly, that the brothers and sisters, who survived the testator, and afterwards died without issue in the lifetime of the wife, were entitled to shares in the residue. *Gray v. Garman*, 2 Hare, 263. And see *Salisbury v. Petty*, 3 Hare, 86 ; *Eyre v. Marsden*, ante, 231 ; 2 Keen, 703, n. 1.

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his death, which happened two months afterwards, and it was then found in a chest belonging to him, enclosed in an envelope, bearing an indorsement in his handwriting in the following words:—"Papers concerning Mr. and Mrs. C. and their children, in regard to there being no settlement made on them at the marriage. To be given up to Mrs. C. at my death, and immediately."

The existence of the deeds did not become known to the daughter, or her husband or children, till after the intestate's death.

The deed poll was not an effectual mode of transfer, either of the East India stock or of the Globe shares; but Mrs. C. after the intestate's death, having taken out administration to his estate, transferred the stock and shares into the names of her husband and herself.

A bill having been filed by one of the co-heiresses and next of kin of the intestate, praying that the deeds might be declared void and delivered up, and praying a declaration that the stock and shares formed part of the intestate's personal estate, or, if the conveyance should be held good, then that the freehold property might be brought into hotchpot:

The court declined to decide the question of the validity of the deed as to the freehold property, or the question of hotchpot, as the former was a question at law, and the latter depended on the former, and, further, could be properly determined only in another suit, which was pending, for the administration of the intestate's estate: but the court

Held, as to the East India stock and the Globe shares, that the deed poll was inoperative; and it declared that the stock and shares formed part of the intestate's personal estate.

JOHN PLURA, of Bath, had three daughters, Elizabeth Frances, who married Garrett Dillon, Ann Hussey, who married Charles Pittman Coppin, and Sarah, \*who married John Gray. On the marriages of Mrs. Dillon and Mrs. Gray, Plura advanced to them certain portions: but he advanced no portion to Mrs. Coppin on the occasion of her marriage.

On the 24th of August, 1831, Plura executed a deed which was expressed to be made between himself of the one part and Charles Pittman Coppin of the other part, by which he demised a house and appurtenances in Bath to Coppin for a year; and on the 25th of August, 1831, (the following day) he executed a deed poll, which, after reciting the marriage of Mr. and Mrs. Coppin, and that there were several children of the marriage, and that no settlement was made on the marriage, and that he was seised of the house and appurtenances before mentioned, and that he was possessed of thirteen shares in the Globe Life Annuity and Insurance Company of London, and of the sum of 1904*l.* 15*s.* 3*d.* East India stock, standing in his name in the company's books kept for the transfer of the same stock, and that, with the view and intent of making some provision for Coppin and his wife, and the issue of their marriage, he had determined to convey, assign, and transfer the before mentioned premises for that purpose in manner after stated, and that he was about to transfer the said sum of 1904*l.* 15*s.* 3*d.* East India stock in order to effect his intention thereafter declared in respect of the same stock, proceeded as follows:—

"Now know ye that the said John Plura, in order to perfect his intention in this behalf, and in consideration of the natural love and affection which he hath and beareth for his said child and grandchildren, and for making some provision for the said Charles Pittman Coppin and Ann Hussey his wife, and the issue of the marriage now or hereafter to be born, and

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for and in \*consideration of the sum of 10s. of lawful money current [\*649] in Great Britain to the said John Plura in hand well and truly paid by the said C. P. Coppin immediately before the execution of these presents the receipt whereof is hereby acknowledged, he the said John Plura hath granted, bargained, sold, aliened, and released, and by these presents doth" &c. The deed poll then proceeded to release the house and appurtenances before mentioned to Mr. Coppin, in fee, to the use of Mrs. Coppin for life, for her separate use, with remainder to the use of Mr. Coppin for life, with remainder to the children of their marriage, begotten or to be begotten, as tenants in common in fee. The deed poll then proceeded in the following terms: "And know ye also, that for settling and assuring the said East India stock and also the said shares of and in the said Globe Life Annuity and Insurance Company, and for effecting the intention of the said John Plura in this behalf, and for the considerations hereinbefore expressed, he, the said John Plura, hath granted, bargained, sold, and assigned and by these presents doth grant, bargain, sell, and assign unto the said Ann Hussey Coppin, her executors, administrators, and assigns, all that the said capital sum of 1904*l.* 15*s.* 3*d.* East India stock aforesaid, and also all those the said several thirteen respective shares of and in the said Globe Life Annuity and Insurance Company respectively, and each and every of the same shares, and all the dividends, interest, and income to be derived or received of, from, or on account of the same premises, and all benefit and advantage of the same, with full power for the said Ann Hussey Coppin, her executors, administrators, and assigns, in the name of the said John Plura, or otherwise howsoever, and either personally or by attorney, and that notwithstanding her said coverture as aforesaid, to ask, demand, sue for, recover, and receive such part or parts of the \*said hereby or intended to be grant- [\*650] ed and assigned premises which a mere assignment thereof will not enable her or them to recover or receive, and on receipt thereof, or of any part thereof, notwithstanding her said coverture, to give good and effectual receipts and discharges for the same." The *habendum* was made to Mrs. Coppin, her executors, administrators, and assigns, for her separate use, and, after her decease, in case her husband C. P. Coppin should survive her, then with full power and authority for him to receive, for his own use, during his life, the interest, dividends, and income to be derived or received from the thereby assigned premises, and after the decease of the survivor of them, then as to the thereby assigned premises, for the benefit of their children, equally.

The deed poll afterwards contained the following passage:—"And the said John Plura doth hereby, for himself, his heirs, executors, and administrators, further direct his real and personal representative, on the reasonable request and at the expense of the person or persons for the time being entitled to the said released and assigned premises, or any estate or interest therein, to make, do, execute, and perfect all such acts, deeds, conveyances, assignments, transfers, or other assurances, for the further, better, or more effectual-



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ly releasing, conveying, transferring, or otherwise assuring the premises aforesaid, according to the true intent and meaning of these presents, and in the mean time to pay all rent, dividends, interest, and income of the same premises unto the person or persons for the time being entitled thereto by virtue of these presents, whose receipt and receipts, notwithstanding coverture as aforesaid, shall be a good and effectual discharge."

At the time of the execution of these deeds, Mr. and Mrs. Coppin [\*651] and their children were living at a distance \*from Mr. Plura, and the existence of the deeds was not communicated to any of them during his life. Two months after the execution of the deeds, Plura died, intestate. Mrs. Dillon and Mrs. Coppin survived him; but Mrs. Gray died in his lifetime, leaving two children, Francis Delaval Gray and Eliza Maria Gray. Mrs. Dillon, Mrs. Coppin, and Mrs. Gray's two children were his next of kin; and Mrs. Dillon, Mrs. Coppin, and Mrs. Gray's son, were his co-heirs at law.

Plura retained possession of the deeds from the time of their execution to the time of his death, when they were found in an iron chest belonging to him, sealed up in an envelope, upon which appeared the following indorsement, in his own hand-writing:—"Papers concerning Mr. and Mrs. Coppin and their children, in regard of there being no settlement made on them at the marriage. To be given up to Mrs. Coppin at my death, and immediately. Drawn by Mr. Evans, solicitor, Bath. Dated August 25th, 1831."

The intestate did not execute any power of attorney for the transfer of the East India stock, or of the Globe shares, beyond that which was contained in the deed poll; and both the stock and the shares were standing in his name at the time of his death, but he did not receive any dividends upon either after the date of the deed poll. He received one payment of rent for the house after the execution of the deeds; but Mr. and Mrs. Coppin alleged that he paid over to them moneys equal to the amount of such rent.

After the intestate's death, Mr. and Mrs. Coppin entered into possession of the freehold house and premises; and Mrs. Coppin, who had obtained letters of administration to the intestate's estate, transferred the Globe [\*652] \*shares and East India stock into the joint names of her husband and herself; and, by a deed poll, dated the 1st of January, 1836, under the hands and seals of Mr. and Mrs. Coppin, and indorsed on the deed of the 25th of August, 1831, Mr. Coppin declared that he would stand seised of the freehold house and premises, to the uses and upon the trusts declared by the deed of the 25th of August, 1831; and Mr. and Mrs. Coppin declared that they would hold the East India stock and Globe shares upon the trusts declared by the same deed.

On the 24th of January, 1833, Mr. and Mrs. Dillon filed a bill against Mr. and Mrs. Coppin, and Mrs. Gray's children, stating, amongst other things, that the intestate had, in his lifetime, advanced or settled upon, or otherwise provided for, Mrs. Dillon, Mrs. Coppin, and Mrs. Gray, various sums of money, to a considerable amount, and praying that the usual accounts of Plura's



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personal estate might be taken, and that the clear residue of it might be ascertained and declared; and that the advancements made to his three daughters respectively might be accounted for and brought into hotchpot; and that, thereupon, one-third part of his residuary estate might be paid to the plaintiff Mrs. Dillon, and that a guardian might be appointed for Mrs. Gray's children, and that a proper allowance might be made for their maintenance and education.

On the 9th of February, 1833, Mrs. Gray's children, by their father as their next friend, filed a bill against Mr. and Mrs. Dillon, and Mr. and Mrs. Coppin, stating, amongst other things, that Plura had, in his lifetime, settled upon, advanced, or given to Mr. and Mrs. Dillon or one of them, and Mr. and Mrs. Coppin or one of them, real estates, moneys, stocks, or funds, and goods and effects of large amount and value, and praying \*that [\*653] the usual accounts of Plura's personal estate might be taken, and that an account might also be taken of the real estates, moneys, stocks, or funds, and goods or effects, settled, advanced, or given by the intestate in his lifetime, upon or to or for the use of Mr. and Mrs. Dillon, or either of them, Mr. and Mrs. Coppin, and Mrs. Gray, and that the same might be brought into account in apportioning the shares of Mrs. Dillon and Mrs. Coppin, and the plaintiffs, (Mrs. Gray's children,) in the intestate's personal estate; and that the clear amount of his personal estate might be apportioned amongst Mr. and Mrs. Dillon, Mr. and Mrs. Coppin, and the plaintiffs, (Mrs. Gray's children,) according to their respective shares and interests.

These two causes were heard together at the Rolls, on the 13th of July, 1833, when one decree was made in both, directing, amongst other things, that the master should inquire what shares or securities of public companies the testator held at his death, and whether they were of the nature of personal or of real estate; and that such of them as should appear to be of the nature of personal estate, should be sold, with the master's approbation; and that the other outstanding personal estate of the intestate should be forthwith laid out and secured and that the clear residue of his personal estate should be ascertained; and that the master should inquire whether any of the intestate's children had any estate or portion by settlement from him, and the value or amount of such estate or portion, with liberty to state special circumstances.

On the 13th of March, 1833, Mr. and Mrs. Dillon filed a bill against Mr. and Mrs. Coppin, and Mrs. Gray's son, praying that a partition might be made of the intestate's real estates. This cause was heard, at the Rolls, on the 28th of June, 1833, when a decree was made, directing [\*654] that a commission of partition should issue. Under this decree a partition was made of certain real estates which had belonged to the intestate, but such partition did not include the freehold house and appurtenances comprised in the deed poll of the 25th of August, 1831, nor, as it appeared, some other freehold property of the intestate. By an order made in the last mentioned cause, dated the 29th of July, 1834, it was ordered that a re-

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ceiver should be appointed of the freehold property of the intestate then remaining undivided.

On the 15th of August, 1836, the bill in the present cause was filed by Mr. and Mrs. Dillon against Mr. and Mrs. Coppin and their children, and against Mrs. Gray's two children, alleging that the deeds of the 24th and 25th of August, 1831, were executed by Plura, not absolutely and indefeasibly, but merely as escrows, and with the intention and understanding, on his part, that the same should be wholly inoperative, unless he should afterwards do some act to perfect them, which he never did; and alleging also, that the deed of the 25th of August, was wholly inoperative for the purpose of passing the East India stock or Globe shares, inasmuch as such stock and shares respectively could pass only by an actual transfer made according to the particular laws and rules applicable to them, and praying that the deeds of the 24th and 25th of August, might be declared void, and might be delivered up to be cancelled, and that it might be declared that the Globe shares and the East India stock, and the interest and dividends of the shares and stock accrued since the intestate's death, constituted part of his personal estate, and that they might be applied accordingly; and that it might be declared, that the house [\*655] and premises \*descended upon and were vested in Mr. and Mrs. Dillon, Mr. and Mrs. Coppin, and Mrs. Gray's son; or, in case the court should be of opinion that the alleged conveyance was insufficient to pass and settle the hereditaments therein comprised, then that it might be declared that the defendants, Coppin and wife, were not entitled to have or hold any part or share of the other real estates, or of the personal estate of the intestate, without bringing the house and premises into hotchpot; and that, accordingly, the same defendants might be put to their election, either to relinquish and reconvey the share or part of the other real estate of the intestate allotted to them under the partition, or else to bring the house and premises into hotchpot; and that, in the meantime, a receiver of the rents of the house might be appointed, and the title deeds brought in and deposited for safe custody; and that, if necessary, a new commission might issue for the purpose before mentioned.

This cause now came on to be heard, before the Lord Chancellor, as an original cause.

It appeared in evidence, on the part of the plaintiffs, that the mode of legal transfer of East India stock was as follows:—By the East India charter, 5th of September, 10 W. 3, pursuant to a power in the act 9 & 10 W. 3, c 44, s. 70, it was provided that the method of making assignments and transfers of East India stock should be by an entry in the books, in a particular form, or by attorney authorized by writing sealed and attested by two witnesses; and that no other way or method should be good or available to convey the interest of the party transferring or ordering the same to be transferred.

[\*656] \*It appeared also that the Globe shares (the company not being incorporated) were transferable by indenture executed at the office of

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the company, in a particular form, according to the deed of settlement of the company.

It also appeared in evidence, on the part of the plaintiffs, that on the 17th of August, 1831, (a week before the date of the deed,) the intestate wrote to a professional friend, Mr. Ford, a letter, which, after stating that he had destroyed his will, and requesting to be furnished with certain special clauses which it had contained, "for an attorney here whom I am about to consult in framing a will, and which now I wish not to delay," proceeded as follows:—"My successors, I fear will not be very friendly; and though I am told one third would be engulfed, I still would like, as I read of a case about twelve months ago, to put the whole into chancery (reformed). In two cases, I now propose deeds of gift, in my own retaining, for present caution."

Mr. Evans, a solicitor of Bath, stated in evidence, on behalf of the defendants, that in August, 1831, Mr. Plura, by letter requested his attendance to take instructions for a deed of gift; that he accordingly waited on Mr. Plura, who then informed him he had made no settlement on the marriage of Mr. and Mrs. Coppin, and that he was anxious to make an immediate provision for them and their children, for that, if he did not, they would be without any; that Plura then gave him instructions to prepare a deed of settlement of a house and appurtenances, No. 7 Queen's Parade, Bath, and of 1904*l.* 15*s.* 3*d.* East India stock, and thirteen shares in the Globe Company, upon such trusts and for such purposes as were set forth in the deed of the 25th of August, 1831: That the deeds were accordingly drawn \*and pre- [\*657] pared by Mr. Evans; and that the intestate, during their preparation, expressed much anxiety to have them perfected: That on the 25th of August, 1831, he attended Mr. Plura with the two deeds for his execution, and when they were approved, he called up his housekeeper, Mrs. Deson, to see him execute them; and that Mr. Plura then explained to Mrs. Deson that the deeds were a settlement on Mr. and Mrs. Coppin and their children, using the words, "Now, Mrs. Deson, recollect what you are going to sign; it is my deed of gift on Mr. and Mrs. Coppin and their children," or words to that effect: That Mr. Plura then executed the deeds, and expressed himself, "Thank God, this is now off my mind," and expressed much satisfaction in having provided for Mr. Coppin, his wife and family: That the deeds were executed and delivered by Mr. Plura absolutely and irrevocably, and, when executed and attested, they were left lying on the table at which Plura was sitting, and on which he had executed them.

The execution of the deeds was attested by Mr. Evans and Mrs. Deson.

Mr. Evans in his evidence, also stated that he knew the wishes of Plura respecting the property comprised in the deeds, and he and Plura, as he verily believed, thought and intended the deeds to be valid and effectual to settle the property in manner therein mentioned.

Mrs. Deson, the other attesting witness, gave similar evidence as to the cir-  
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cumstances attending the execution of the deeds, and she also stated that after the deeds had been executed and attested, he, Plura, folded them up and put them away in his iron chest; and that the intestate, Plura, many [\*658] times after the execution of the deeds of settlement, expressed great satisfaction to her at having executed them, and said how glad he was that he had done it, as in case any thing happened to him before he made his will, Coppin and his wife and family, would be destitute.

Mr. *Sharpe* and Mr. *Bazalgette*, for the plaintiffs.—First, the deed was not well executed and delivered, so as to operate at all. It is not necessary to decide, in the present case, whether, if a deed be formally delivered with apt and proper words, but be retained by the party executing it in his own possession, that retention will prevent the operation of the deed. Old dicta seem to show that it would; but *Doe dem. Garnons v. Knight*,<sup>(a)</sup> and *Exton v. Scott*,<sup>(b)</sup> seem to show that, if the delivery of the deed be perfectly unqualified, its retention by the grantor, after such unqualified delivery, will not render it inoperative. In the present instance, it is quite clear from Mr. Plura's letter to Mr. Ford, and from the envelope in which the deeds were found, that the delivery was a qualified delivery only. Could Mrs. Coppin in the lifetime of her father have compelled him, by bill in equity, to deliver the deeds to her? Clearly not. This question is put, and answered in the negative, by Sir Anthony Hart in *Uniacke v. Giles*.<sup>(c)</sup>

Secondly, supposing the deed to have been well executed and delivered, and to have been sufficient to pass the freehold house, still, as to the East India stock and the Globe shares, it is merely a contract; for the [\*659] evidence taken in the cause proves that the property in such stock and shares can be passed only by certain formalities, with which the testator made no attempt to comply.

A contract of this kind amounts, at the utmost, to a trust executory, which, when voluntary, the court never recognizes; *Ellison v. Ellison*,<sup>(d)</sup> *Antrobus v. Smith*,<sup>(e)</sup> *Edwards v. Jones*,<sup>(g)</sup> *Collinson v. Pattrick*,<sup>(h)</sup> *Fortescue v. Barnett*.<sup>(i)</sup> The only question, is whether an exception to this rule is to be made in cases in which the foundation of the deed is a meritorious consideration. No such exception was made in *Antrobus v. Smith*, which was the case of a child, or in *Edwards v. Jones*, which was the case of a niece; and the only case in which it has been made a ground of decision is *Ellis v. Nimmo*; <sup>(k)</sup> but not only is that case unsupported by any previous authority, but it was, in substance, overruled by Lord Plunket upon a rehearing of the cause.<sup>(l)</sup> Sir E. Sugden grounds his decision in *Ellis v. Nimmo* upon the analogies of covenants to stand seised and defective executions of powers; but the reference to covenants to stand seised proves too much, as any rela-

<sup>(a)</sup> 5 B. & C. 671.<sup>(b)</sup> 6 Sim. 31.<sup>(c)</sup> 2 Molloy, 257.<sup>(d)</sup> 6 Ves. 656.<sup>(e)</sup> 12 Ves. 39.<sup>(g)</sup> 1 Mylne & Craig, 226.<sup>(h)</sup> 2 Keen, 123.<sup>(i)</sup> 3 Mylne & Keen, 36.<sup>(k)</sup> Lloyd & G. Rep. temp. Sugden, 333.<sup>(l)</sup> See *Holloway v. Headington*, 8 Sim. 324.

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tionship in blood, however remote, is sufficient to support such a covenant ;(a) and cases of supplying defects in executions of powers have always been treated as excepted cases, which the court will not follow in determining other cases ; *Antrobus v. Smith*.(b) One objection to any such distinction as that founded on meritorious consideration, is the difficulty of defining what is a meritorious consideration.

\*If, however, the deed should be held to be effectual as to the [\*660] house, that property must be brought into hotchpot, for although an advancement to the heir may be exempt under the statute of distributions(c) from being liable to be brought into hotchpot, yet that exemption does not extend to an advancement to a co-heiress, for one co-parcener is not the heir ; *Reading v. Royston* :(d) and an heir in borough English is not the heir within the meaning of the statute ; *Lutwyche v. Lutwyche*.(e) *Pratt v. Pratt*.(g) *Toller on Executors*.(h)

The rule requiring advancements to be brought into hotchpot applies to property of every description, whether advanced by the intestate in his lifetime or settled by him, so as to take effect after his death, *Edwards v. Freeman* ;(i) and not only the life interest of the daughter or other person advanced, but the absolute property must be brought into hotchpot, *Weyland v. Weyland*.(k)

Mr. Wigram, and Mr. Beavan, for Mr. and Mrs. Coppin.—The first question is, whether this settlement is to be treated as an escrow ; and, if not, then will arise the question as to the effect of the deeds and of the subsequent circumstances.

It has been established, by a series of authorities, that when a voluntary deed has been executed and delivered, neither its retainer in the hands of the settlor, nor the absence of communication of its contents to the *cestui que trust*, will invalidate it. Thus in *Barlow v. Heneage*.(l) [\*661] a father conveyed an estate to trustees for his daughters, and retained possession both of the deed and of the estate ; yet the deed was held binding on him. So, in *Lady Hudson's case*.(m) a voluntary deed, giving a wife 100*l.* a year in augmentation of her dower, was kept in the possession of the settlor, and was afterwards cancelled by him ; yet it was held effectual at law, and a bill to be relieved from it was dismissed. In *Clavering v. Clavering*.(n) a father settled an estate on one son in 1684, on another son in 1690, and “he never delivered out or published the settlement,” yet a bill to be relieved against the first settlement was dismissed by Lord Keeper Wright. In *Boughton v. Boughton*.(o) a voluntary deed was kept by the maker ; yet Lord Hardwicke held it valid, and acted on it. So, in *Sear v.*

(a) Sheppard Touchet. 511, 512.

(d) 1 Salk. 242.

(h) pp. 371, 381.

(i) Pre. Ch. 211.

(o) 1 Atkyns, 625.

(b) 12 Ves. 39.

(e) Ca. temp. Tall 176.

(i) 2 P. W. 435.

(m) Ib. 235.

(c) 22 &amp; 23 Car. 2, c. 10.

(g) 2 Strange, 935.

(k) 2 Atk. 632 ; see p. 635.

(n) Ib. 235.



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*Ashwell*, (a) and *Worrall v. Jacob*, (b) voluntary deeds, though retained in the settlor's possession, were held valid. This point was fully considered by the Court of King's Bench in *Doe dem. Garnons v. Knight*. (c) There, Wynne, an attorney, having misapplied moneys of Garnons, a client, executed a mortgage in favor of Garnons, and delivered it over to his (Wynne's) sister; and the existence of the mortgage was not known by Garnons until after the death of Wynne. Mr. Justice Bayley, in delivering the judgment of the court, said, "Upon these authorities it seems to me that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately, that it is [\*662] a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential." This case was followed by the Vice-Chancellor, in *Exton v. Scott*, (d) where A., having received moneys of B., privately, and without communication to B., executed a mortgage for them, and retained the deed, and though the existence of the deed was not known to B. until after the death of A., yet the mortgage was held valid. These authorities prove, therefore, that neither retainer of the deed nor the absence of communication of the contents to the *cestui que trust* (e) affects its validity; and the evidence taken in this cause shows that the intestate (Mr. Plura) intended that the deeds should have, and believed that they really had, full and effectual operation. [1]

If, then, the settlement be operative, it follows that, as to the real property, the legal estate has passed to the defendants, and this court has no jurisdiction to interfere; the plaintiff's remedy, if any, being by action at law.

As to the personal estate comprised in the settlement, there are many grounds on which the defendants can sustain their right to it.

First, the deed has been perfected by the administratrix. The legal interest has passed to the defendants, without fraud or breach of trust, but in pursuance of the direction in the deed, which the settlor gave to his real representatives, "to do all acts, deeds, &c., for the further, better, and more effectually releasing, conveying, &c. the premises." It differs, therefore, widely from the cases where the *cestui que trust* comes to this court to have his title perfected; here he requires no aid, and his legal title can only be displaced by a better equity.

(a) 3 Swan. 411, n.

(b) 3 Mer. 256; see p. 270.

(c) 5 Bar. & Cr. 671.

(d) 6 Simons, 31.

(e) See *Bill v. Cureton*, 2 Mylne & Keen, 503.

[1] "The only other question arises from the circumstance of the instrument having been kept in the possession of the party; does that affect its legal validity? In the case of *Dillon v. Coppin*, I had occasion to consider that subject, and I took pains to collect the cases upon it. The case of *Doe v. Knight* shows, that if an instrument is sealed and delivered, the retention of it by the party in his possession does not prevent it from taking effect. No doubt the intention of the parties is often disappointed by holding them to be bound by deeds which they have kept back, but such unquestionably is the law." Wigram, V. C. *Fletcher v. Fletcher*, 4 Hare, 79.



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\*Secondly, the words "grant, assign," &c., and the direction to [\*653] the representatives to convey, amount to a covenant on which an action at law might be brought; *Deering v. Farrington*; (a) and though the settlement is by deed poll, yet any party interested in it may maintain covenant on a deed poll; Comyn's Digest, tit. Covenant (A 1.); Rolle's Abridgment, tit. Covenant, 1 Salkeld, 197, 8 Mod. 40, 3 Keble, 115; and the principle is admitted, *arguendo*, in 5 Barn. & Cr. 357. It matters not that the settlement is voluntary; for, at law, every deed imports a consideration. The defendants are, therefore, creditors on the estate, and might bring an action against the administratrix, in case of her refusal to perfect the settlement; and they would recover, in damages, the value of the personal property in the deed. To prevent this circuitry, however, the court will refuse its aid to take away the East India stock and Globe shares from the defendants, and thus to compel the administratrix to be guilty of a *tort*, for which she would be liable in damages at law; *Vernon v. Vernon* (b) and *Stephens v. Trueman*. (c) In *Williamson v. Codrington*, (d) a man made a voluntary settlement on his natural children, and bound himself to warrant; he afterwards sold the estate, yet his assets were held liable in equity.

Thirdly, though by the East India Company's charter the stock will not pass by deed, yet, like other things which will not pass by deed, it may pass by estoppel; and the settlor and the plaintiffs who claim under him have no right to set aside the transfer.

Fourthly, a trust has been well created, which bound the intestate and his representatives. In *Ex parte Pye* (e) \*a testator gave autho- [\*664] rity to purchase an annuity in France for a stranger: the annuity was purchased in the testator's name, who executed a power of attorney to transfer it, but the transfer was not made until after the testator's death. It was held that a good and binding declaration of trust had been made of the annuity.

Lastly, if the settlement be an imperfect conveyance, yet, being made in favor of children and grandchildren, and being supported by a "moral consideration," this court, so far from destroying, will, if necessary, perfect it. The court has been in the constant habit of lending its aid in cases of defective appointments under powers; in surrenders of copyholds, *Chapman v. Gibson*, (g) *Hale v. Lamb*, (h) *Rodgers v. Marshall*; (i) and on a covenant to stand seised, in favor of persons coming within the "meritorious consideration." The point was admitted by the court in *Colman v. Sarel*, (k) where it is said "a court of equity will not carry into execution a voluntary deed without either a valuable or meritorious consideration." In *Wiseman v. Roper*, (l) after the plaintiff's marriage, his uncle, the defendant, covenanted,

(a) 1 Modern, 113.

(b) 2 Peere Williams, 594.

(c) 1 Ves. sen. 73.

(d) 1 Ves. sen. 511.

(e) 18 Ves. 140.

(g) 3 B. C. C. 229.

(h) 2 Eden, 292.

(i) 17 Ves. 294.

(k) 3 B. C. C. 12, and 1 Ves. jun. 50.

(l) 1 Ch. Rep. 158.

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in consideration of love and affection, and to regain the good will of the plaintiff's father, to settle estates, when they descended on him; and the court decreed that the covenant should be specifically performed. In *Bonham v. Newcomb*(a) it is said, "If a man makes a voluntary conveyance, and there be a defect in it, so as it cannot operate at law, this court will not decree an execution thereof; but sometimes it has been decreed where it is intended a provision for younger children." In *Beard v. Nutt* [\*665] *hall*,(b) a voluntary bond to make a jointure was \*decreed to be made good out of the husband's estate; "for an agreement, though voluntary, under hand and seal, ought to be decreed by the court." So in *Fothergill v. Fothergill*(c) it is said, "Whenever a conveyance is made upon a good consideration, if there be any defect in the execution of it, this court hath always supplied the defect. It has further been held, that provisions for wife, children, &c. were considerations for which this court would supply such defects. In *Husband v. Pollard*,(d) a father was decreed specifically to perform a covenant contained in a voluntary settlement, to renew leaseholds for the benefit of his son, a volunteer. In *Watts v. Bullas*,(e) a voluntary conveyance made to a brother of the half blood, but which was defective at law, was made good in equity against the heir; the Lord Keeper being of opinion that as the consideration of blood would, at common law, raise a use, and as, before the statute of 27 Hen. 8, such *cestui que use* could have compelled an execution of the use in a court of equity, so would this imperfect conveyance raise a trust, in respect to the consideration of blood, and consequently ought to be made good in equity.

In *Sloane v. Cadogan*,(g) it was held, that "as against a party, himself, and his representatives, a voluntary settlement is binding," although no legal interest passed by it; "for, where a trust is created, no consideration is essential, and the court will execute it, though voluntary."

In *Fortescue v. Barnett*,(h) a voluntary settlement, by a brother, [\*666] of a policy of assurance on his sister and her \*children, was held valid, though the legal interest in the policy never passed.

The question in this cause was recently raised in the case of *Ellis v. Nimmo*,(i) and it was there distinctly decided, after full consideration, that a court of equity would decree specific performance of a contract in favor of children, and those coming within the consideration of blood.(k)

With respect to the question of hotchpot, a co-parcener is not bound to bring real estate into hotchpot; for, by the statute of distributions, 22 & 23 Car. 2, c. 10, the heir is specially excepted; and coparceners form but one heir; Littleton, 313. Under the custom of London, on which, in

(a) 2 Ventr. 364.

(b) 1 Vernon, 427.

(c) Freeman, 256.

(d) 2 Peere Wms. 467.

(e) 1 Peere Wms. 60

(g) 2 Sugd. Vend. Appx. p. 66, 10th ed.

(h) 3 Mylne &amp; Keen, 36.

(i) 1 Ll. &amp; Goo. Rep. Temp. Sugd. 333.

(k) See also *Thompson v. Attfeild*, 1 Vernon, 40; *Wright v. Wright*, 1 Ves. sen. 408; *Saltera v. Melhuish*, Ambler, 247; see p. 251.

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this respect, the statute was founded, (a) heirs and co-heirs were not bound to bring land into hotchpot; *Civil v. Rich*; (b) nor was the heir in gavelkind; *Lutwyche v. Lutwyche*; (c) and the law is so stated in 4 Burn's Ecc. Law, 398. In this case, the persons who take the real and personal estate are different; and to bring the land into hotchpot would have the effect either of giving to Miss Gray, who is not one of the co-heirs, a share in the lands, or of giving to her brother, Francis Delaval Gray, a greater share of the personal estate than his sister, contrary to the object and spirit of the statute, which was to create an equality.

The life estate only of Mrs. Coppin should be brought into hotchpot, and the interest given to her husband and her children cannot be charged against her in the \*distribution of the intestate's estate, for this is not [\*667] like a case where a child has concurred in a settlement, in which case the whole fund settled might be considered an advancement by the parent, and a resettlement of it by the child.

Mr. *Richards* and Mr. *J. Russell* appeared for the children of Mr. and Mrs. Coppin.

Mr. *Kenyon Parker* appeared for Francis Delaval Gray.

Mr. *Tinney* and Mr. *Wilbraham* appeared for Eliza Maria Gray.

Mr. *Sharpe*, in reply.—The circumstance that Mrs. Coppin has now, as administratrix, clothed herself and her husband with the legal title to the East India stock and the Globe shares, is no ground of defence whatever to the plaintiff's claim; for the question raised in this cause is, whether that stock and those shares did not, at the time of the intestate's death, constitute part of his personal estate; and, if they did, they belong to those who were then entitled to his estate; and no act of the administratrix in her own favor can defeat that title.

The defendants, by setting up the deed against the claim of the parties entitled to the intestate's estate, put themselves in the position of asking the court to execute the deed; and the question which the court will now consider is, whether they are entitled to have the deed executed, and, if they are not, the court will declare that the property forms part of the intestate's estate.

\*As to the argument, that the deed amounts to a covenant upon [\*668] which an action at law might be maintained, and, therefore, that the administratrix was justified in what she has done, it may be observed, that that case is not made by the pleadings in this cause, and that, even if it had been made, it would have had no effect. The course for the administratrix to have taken was to treat what she has done as a payment made in her discharge; but the simple answer to the argument is, that the words of the deed would not raise a covenant, for a covenant cannot be raised by an assignment, in a case in which, as here, the property is not assignable by deed.

(a) See 2 Peere Wms. 356.

(b) 1 Vern. 216.

(c) Ca. temp. Talbot, 276.

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The authorities on this subject are collected in *Platt on Covenants*.(a) Besides this, an implied covenant cannot be sued on without consideration; *Shubrick v. Salmond*;(b) and equity has never acted on implied covenants; *Saltern v. Melhuish*.(c) If this argument were good here, it would have been equally good in *Colman v. Sarel*,(d) which was an assignment, by deed, of stock, or in *Ellison v. Ellison*.(e)

It is evident that the main reliance of the defendants is upon the decision in the case of *Ellis v. Nimmo*; but, in addition to what has been already said upon that decision, it may be observed that the only authorities to which it refers are old cases, determined before the law on this subject was settled; and, with respect to one of them, *Watts v. Bullas*,(g) where a voluntary conveyance to a brother of the half blood was made good, it is to be remarked that Lord Hardwicke disputed the authority of that case, in *Goring v. Nash*.(h)

[\*669] \*As to the question of hotchpot, *Civil v. Rich*,(i) does not affect the case, for, by the custom of London, land is never brought into hotchpot, either as against co-heirs or younger children: *Cox v. Belitha*,(k) *Tomkyns v. Ladbroke*.(l) This is quite contrary to the statute of distributions, and shows that no decision as to the custom of London can effect a case under the statute. Where property is settled on a child, her husband and children, the whole must be brought into hotchpot; *Weyland v. Weyland*;(m) and it is immaterial whether the settlement is made before or after marriage.

[THE LORD CHANCELLOR:—You must carry your proposition to this extent, that if a father settles property on a grandchild, and the child gets nothing, yet the child must account for it.]

As regards the real estate, the plaintiffs are entitled to have the deed delivered up to be cancelled.

THE LORD CHANCELLOR:—If I should be of opinion that the deed is inoperative as to the stock and shares, it will then remain to be considered whether it is inoperative as to the real estate: this is a mere question of law, and I do not see how I can order the deed to be delivered up on the ground that it is inoperative at law. It seems that the question of hotchpot may be determined in the other suit.

Dec. 24.—THE LORD CHANCELLOR:—The only parts of this case upon which I can make a decree, are the title to the East India stock and [\*670] the \*shares in the Globe Insurance Company. The title to the freehold property is a question purely at law, and the point as to hotch-

(a) p. 50.

(b) 3 Burr. 1637; see p. 1639.

(c) Ambler, 247; see p. 251.

(d) 3 B. C. C. 12. 1 Ves. jun. 50.

(e) 6 Ves. 656.

(g) 1 P. W. 60.

(h) 3 Atk. 186; see p. 189.

(i) 1 Vern. 216.

(k) 2 P. W. 271; Toller, 396.

(l) 2 Ves. sen. 591.

(m) 2 Atk. 632; see p. 635.

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pot not only depends upon that title, but can only be properly raised in the suit for the administration of the estate.

On examining the evidence, I think it sufficient, as to the nature of the title to the East India stock and to the Globe shares, to enable me to decide the questions which have arisen, without any previous inquiry. Indeed, as to the East India stock, the whole is to be found in the act of parliament, and it is clear, as to both, that the property could not be transferred by the mere operation of the deed of the 25th of August, 1831. As to both, further acts were necessary to transfer the legal estate to others. Indeed, as to the East India stock, the deed recites that Plura was about to transfer it, in order to effect his intention. The deed is a deed poll; and there is no evidence of its having ever been out of his possession, or that the daughter, Mrs. Coppin, or any person on her behalf, was, in any respect, party to the transaction, or even knew of any such deed having been executed. It professes to grant, bargain, sell, and assign the stock and the shares to Mrs. Coppin, with full power, in the name of Plura or otherwise, and either personally or by attorney, to sue for, recover, and receive such part of the premises which a mere assignment thereof would not enable her or them to recover or receive; and it is proved that a mere assignment would not enable her to receive or recover either the stock or the shares. Here is no contract, but a deed poll, professing to assign property incapable of passing by such assignment; and the question is, whether the intended donee is entitled to the assistance of this court to give effect to this imperfect gift.

\*It is not necessary to look further, for this purpose, than the case [\*671] of *Antrobus v. Smith*.(a) There, the gift was in favor of a child, but it was voluntary and imperfect, and the instrument was found in the father's possession. I believe that case to have been well decided, and nothing which has since occurred affords any reason for departing from the principle upon which it is founded. It is also to be observed in this case that the envelope proves that the father did not intend that the instrument should operate until after his death, though it professes to be an immediate assignment: it is not, therefore, to be presumed that he ever parted with the possession of it. It was, indeed, argued that the father had, by that instrument, made himself a trustee of the property. That argument was attempted in *Antrobus v. Smith*; but it failed, as it necessarily must here. So far from making himself a trustee of the stock, he states, upon the instrument, his intention of perfecting the gift by transfer of the stock, and endeavors to provide the means by which the grantee may obtain the legal title. The distinction, taken by Lord Eldon, between such cases as this and trusts constituted, has been so often and so well explained by him, and is so satisfactory, as to leave no room for this argument. I allude, particularly, to *Ellison v. Ellison*(b) and *Pulvertoft v. Pulvertoft*.(c)

(a) 12 Ves. 39.  
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(b) 6 Ves. 656.  
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(c) 18 Ves. 84.



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It was then said that this instrument would, at all events, amount to a covenant. If that were so, the case would not be relieved from many of the objections made to it, and it would be open to the case referred to of *Saltern v. Melhuish*.(a)

[\*672] "I must, for these reasons, declare that the deed did not operate, so as to affect the testator's interest in the East India stock and the Globe shares, and that they constitute part of his personal estate to be administered.(b)[1]

(a) Ambler, 247 ; see p. 251.

(b) See *Jefferys v. Jefferys*, Craig & Phillips, 138.

[1] *James v. Rydder*, 4 Beav. 600 ; 1 Keen, 558, n. 1 ; 2 Keen, 134, n. 1. The testator by a voluntary deed, covenanted with trustees that in case A. and B. his two natural sons, or either of them should survive him, his (the testator's) executors and administrators should within twelve months after his death pay to trustees named in the deed, 60,000*l.* upon trust for such of them (A. and B.) as should attain twenty-one and be living at the time of his death ; and if neither of them, having survived him, should attain twenty-one, then upon trust for him (the testator,) his executors and administrators. The testator retained the deed in his own possession until his death, and did not communicate it either to the trustees or to A. and B. The testator by his will dated some years later than the deed, bequeathed all his property upon trust for the benefit of his wife, his said sons A. and B. and his legitimate children. After his death, the deed of covenant was found among his papers. A. survived the testator and attained twenty-one. It was held, that although the deed of covenant was voluntary, it nevertheless created a trust for A., and that the refusal of the trustee to sue at law upon the covenant did not prejudice the right of A. to recover the payment of the debt out of the assets of the testator : that the deed was not of a testamentary nature, there being no power of revocation reserved to the covenantor ; and that the retention of the deed in his possession, and the absence of communication respecting it to the trustees and the *cestui que trust*, did not affect its validity. *Fletcher v. Fletcher*, 4 Hare, 67. A testator bequeathed a sum of money to trustees, in trust for his daughter for life, and in case she died without leaving issue, for her next of kin, exclusive of her husband. During the lifetime of the daughter, her mother as presumptive next of kin, by a voluntary deed assigned her expectant interest in reversion to the husband. It was held, that on the death of the daughter without leaving issue, the assignment operated only as an agreement to assign ; and consequently, that being voluntary, a court of equity would not enforce it. Lord Lyndhurst : "The deed being in this case merely voluntary, it was an assignment altogether inoperative ; and the only remaining question will be whether, although void as an assignment, it is effectual as a declaration of trust. The residue is assigned to the plaintiff in trust for himself, &c. There can be no difference between an assignment to the plaintiff in trust for himself, and an assignment to him simply. The assignment fails, and with it the trust. If such an assignment be inoperative it does not convert the assignor into a trustee for the assignee. It has been repeatedly decided, that where a gift is intended, as in the present case, and it is imperfect or ineffectual, this cannot be converted into a declaration of trust so as to make the donor a trustee for the donee. The authorities are conclusive upon this point. The cases of *Antrobus v. Smith*, (12 Ves. 39,) and *Edwards v. Jones*, (1 Myl. & Cr. 226,) were cases of imperfect gifts. It was contended that the donors were trustees for the donees. But in both cases the court held that an incomplete gift would not operate as a declaration of trust. The judgment of Sir William Grant on this point, in *Antrobus v. Smith*, is conclusive in the reasoning. It is stated fully by Lord Cottenham in *Edwards v. Jones*, and it is unnecessary to repeat it. In *Sloan v. Cadogan*, (Sug. V. & P. app. xxvii,) which was so much relied upon in the argument, Bromley Cadogan had a vested interest in the property assigned ; he conveyed it by a voluntary deed to trustees in trust for the Earl his father. Sir William Grant considered that a trust was thereby created, and upon that his judgment was rested. It is obvious however, that that case is very distinguishable from the present, which is the assignment of a mere expectancy, that conveys no estate or interest to the assignee, although when made for a valuable consideration, which is wanting here, it would be supported in equity." *Meek v. Kettlewell*, 1 Phillips, 342.



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1840.—Talbot v. The Earl of Shrewsbury.—Doyle v. Wright.

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*Between* JOHN TALBOT and AUGUSTA TALBOT, Infants, by their Next Friend HORACE ST. PAUL, Plaintiffs; *and* The Right Honorable JOHN Earl of SHREWSBURY, JOHN WRIGHT, WILLIAM BLOUNT, JAMES HUR-  
TLE FISHER, Sir HORACE DAVID CHOLWELL ST. PAUL, Bart., The Honorable CRAVEN FITZHARDINGE BERKELEY, M. P., and AUGUSTA his Wife, formerly AUGUSTA TALBOT, Widow, and the Rev. THOMAS DOYLE, Defendants.

*And between* The Rev. THOMAS DOYLE and JOHN TALBOT and AUGUSTA TALBOT, Infants, by the said THOMAS DOYLE, their Testamentary Guardian and Next Friend, Plaintiffs; *and* JOHN WRIGHT, WILLIAM BLOUNT, JAMES HUR-  
TLE FISHER (when he shall come within the Jurisdiction of this Court,) The Honorable CRAVEN FITZHARDINGE BERKELEY, M. P., and AUGUSTA BERKELEY, his Wife, formerly AUGUSTA TALBOT, Widow, and the Right Honorable JOHN Earl of SHREWSBURY, Defendants.

*And between* JOHN TALBOT and AUGUSTA TALBOT, Infants, by their Next Friend HORACE ST. PAUL, Plaintiffs; *\*and* The [\*673] Honorable CRAVEN FITZHARDINGE BERKELEY, The Honorable THOMAS MORTON FITZHARDINGE BERKELEY, and GEORGE KEATS CORFIELD, Defendants.

(*By Supplemental Bill.*)

1840: February 1, 5.

Jurisdiction of the court in controlling the powers of testamentary guardians.

The circumstance that it will be more for the pecuniary interest of a child to be educated in one religious faith than in another, will not induce the court to interfere with his religious education. And, *semble*, the court will not interfere with the discretion of the testamentary guardian as to the faith in which he educates his ward, particularly if that faith be the faith which the ward's father professed.

THE infant plaintiffs John Talbot and Augusta Talbot, were the only children of the Honorable George Henry Talbot, deceased, by his marriage with the defendant Augusta Berkeley, formerly Talbot. The plaintiff John Talbot was born on the 18th of February, 1830, and the plaintiff Augusta Talbot was born on the 6th of June, 1831.

At the time of Mr. Talbot's marriage, he professed the Roman Catholic faith, while his intended wife was, as she afterwards continued, a Protestant. No stipulation, however, was made in the marriage settlement, or, as far as appeared, in any other manner, as to the faith in which the children of the marriage should be educated.

By a separation deed, made between Mr. and Mrs. Talbot and certain other persons, on the 2d of February, 1833, it was, amongst other things, stipulated that Augusta Talbot should, until she attained her tenth year, remain under the sole care and management of her mother, and that the mother should have the liberty of seeing her son, the plaintiff John Talbot, at all reasonable times, while he should remain with his father.

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Mr. George Henry Talbot (the father of the infant plaintiffs) died on the 11th of June, 1839, having, by his will dated the 10th of June, 1838, appointed the Rev. Thomas Doyle, who was a clergyman of the Roman Catholic Church, the sole and entire guardian of his children [\*674] the infant plaintiffs, and his sole executor, and having bequeathed to him the whole of his personal property.

Under the will of Charles Earl of Shrewsbury, whose executors the defendants Wright, Blount, and Fisher were, the infant plaintiffs were entitled to two sums of 30,000*l.* each, contingently upon their attaining the age of twenty-one years, or, as to the female infant, being married, subject to the life interest of their mother in a sum of 500*l.* per annum, part of the income of one of those two sums, and with a right to an allowance for their maintenance and education during their minorities.

The defendant John Earl of Shrewsbury, as residuary legatee of the testator Charles Earl of Shrewsbury, would be entitled to the sums in question, if neither of the infant plaintiffs lived to attain a vested interest in them.

Mr. George Henry Talbot had been entitled to a life interest in the sums in question; and the bill in the second mentioned cause alleged that certain arrears were due to him at his death, which the plaintiff Doyle, as his executor, claimed.

The general object of both suits was to have the trusts of the will of the testator Charles Earl of Shrewsbury, with respect to the two sums of 30,000*l.* performed, under the decree of the court; but the second mentioned suit asked more extensive directions than the first.

The bill in the first mentioned cause (*Talbot v. The Earl of Shrewsbury*), was filed on the 15th of July, 1839, and the bill in the second mentioned cause (*Doyle v. Wright*) was filed on the 21st of August, 1839.

On or about the 23d of August, 1839, a petition in the first mentioned cause was presented to the Lord Chancellor, in the name of the infants, praying that the defendants the Earl of Shrewsbury and Thomas Doyle might be restrained from taking the petitioners, or either of them, out of the jurisdiction, and that the petitioners might be permitted to reside with their mother at such reasonable and proper times and periods as to the court should seem meet, and more particularly that the petitioner John Talbot might be permitted to visit and reside with his mother; and, if it should be deemed expedient that he should return to school, then that his mother might be permitted to visit him, and to communicate with him, at all convenient times and periods, at the school at which he might be placed; and that he might be permitted to spend his holidays with his mother; and that the infant petitioner, Augusta Talbot, might remain under the care and control of her mother; and that it might be referred to the master to settle a scheme for the future education of the petitioners, and to inquire and report who would be a fit and proper person to superintend their education; and that it might also

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be referred to the master to inquire and state what would be a proper sum to be allowed for the past and future maintenance of the petitioners, regard being had, in making such inquiries, to the just claims of the petitioners to visit their mother, and reside with her at all convenient times, and to the necessity of cultivating those natural feelings of affection which existed between the petitioners and their mother, and regard being also had to the present condition in life and future prospects of the petitioners.

\*On or about the same day, (the 23d of August, 1839,) a petition [\*676] in the second mentioned cause was presented to the Lord Chancellor, by the plaintiffs in that cause, praying that it might be referred to the master to inquire and state to the court of what the fortune of the infant petitioners consisted, and what would be proper to be allowed for their maintenance and education respectively during their respective minorities, and out of what funds; and (the petitioner Doyle consenting thereto if the court should think fit) that the petitioner John Talbot might be allowed, accompanied by his tutor, to reside with the Earl of Shrewsbury, and be educated under his inspection, but under the direction of the petitioner Doyle, and also, accompanied by his tutor, to accompany the Earl of Shrewsbury when he should visit the continent of Europe, during such periods and on such conditions as the court should think proper; and that, if necessary, it might be referred to the master to ascertain and state whether it would be for the benefit of the petitioner John Talbot that he should be allowed, in company with his tutor, to reside with the Earl, and be educated under his inspection, but under the direction of the petitioner Thomas Doyle, and to accompany the Earl during his visits on the continent of Europe, and during what period and on what conditions, the petitioner Doyle consenting thereto, if the court should think fit.

These two petitions were heard before the Vice-Chancellor on the 28th of August, 1839, when his honor pronounced one order upon both of them, but that order was not drawn up, and the two petitions were reheard before the Lord Chancellor on the 7th of September, 1839, and upon that occasion his lordship, after hearing counsel for all parties, except Sir Horace St. Paul, \*pronounced an order, which was not drawn up at the time, [\*677] but was eventually drawn up and passed. This order, after directing (with the consent of the defendants Wright, Blount, and Fisher,) that certain annual sums should be paid to the testamentary guardian, Doyle, for the maintenance of the infant petitioners, proceeded as follows:—

“And it is ordered that the infant plaintiff John Talbot, with his tutor, be allowed to reside and travel abroad with the defendant John Earl of Shrewsbury; the said last named defendant, by his counsel, undertaking to bring the said infant plaintiff back within the jurisdiction of this court, on or before the 1st day of June, 1840, or at such other time as this court shall direct: and it is ordered that the defendant Augusta Berkeley be at liberty to visit the said infant plaintiff John Talbot at the residence of the said de-

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fendant John Earl of Shrewsbury, or elsewhere, at all reasonable times : and it is ordered, that. the said defendants John Wright, William Blount, and James Hurtle Fisher, the said trustees, or either of them, do pay to the said defendant Augusta Berkeley, such sum or sums of money as they may think reasonable for expenses already incurred, or to be hereafter incurred by her in visiting the said infant plaintiff John Talbot."

The remainder of the order provided for the taxation and payment of costs, and reserved to all parties liberty to apply to the court as they might be advised.

This order, although not drawn up until after the 5th of February, 1840, was, in the meantime, acted upon by the Earl of Shrewsbury, by taking the infant John Talbot abroad.

[\*678] \*Mr. and Mrs. Berkeley, had intermarried on the 15th of August, 1839, but no notice of that marriage had been taken, by any of the parties, before the Lord Chancellor, when the order of the 7th of September was pronounced ; and Mr. Doyle afterwards stated that he did not become aware of the fact of the marriage until the 9th of September.

On the 13th of January, 1840, Mr. Doyle presented to the Lord Chancellor a petition in the secondly mentioned cause (*Doyle v. Wright*), praying that the defendants Mr. and Mrs. Berkeley might be ordered to deliver up the person of the infant plaintiff Augusta Talbot to the petitioner, her sole testamentary guardian.

The prayer of this petition was supported by allegations and affidavits, including one affidavit of a medical man, tending to show that the petitioner could not properly visit the infant Augusta Talbot whilst she remained with Mr. and Mrs. Berkeley ; and that the state of the infant's health was not such as to form any objection to her being removed from her mother. In opposition to the petition, affidavits of two physicians, who had attended the infant, stated that her health was such as to render a mother's attention essential ; and other affidavits were made, which, amongst other things, stated that a Roman Catholic governess had been provided for her.

On the 27th of January, 1840, a petition to the Lord Chancellor was presented, in the three suits, in the name of the infant plaintiffs, praying that the orders of the 28th of August, 1839, and the 7th of September, 1839, might be discharged, altered, or varied as to his lordship might seem meet, and as the circumstances in the petition stated might require ; and that it might be referred to the master to settle a scheme for the future

[\*679] \*education of the petitioners, regard being had, in settling such scheme, to the limitations of the act of parliament stated in the petition, and regard being had, in settling the scheme for the education of the petitioners, to the delicate state of health of the petitioner Augusta Talbot, and to the necessity of her being educated under the care and management of her mother ; and that it might be referred to the master to inquire and report what would be a proper sum to be allowed for the past and future main-

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tenance of the petitioners, regard being had, in determining the amount of such maintenance, to the present condition and future prospects in life of the petitioners, and to the state of health of the petitioner Augusta Talbot; and that until the master should have made his report, the petitioner Augusta Talbot might be permitted to reside with her mother, and that all necessary directions might be given for the payment of a proper sum to her mother, for her maintenance and education; and that until the master should make his report, the petitioner John Talbot might be permitted an unrestrained intercourse with his mother, and might be allowed to visit his mother, at her own residence, at reasonable and proper times, and to reside with her for convenient and proper periods.

This petition was grounded not only upon allegations tending to show that Mrs. Berkeley had not been allowed proper access to her son, whilst he continued in England, after the order of the 7th of September had been pronounced, but also upon the provisions of the act of parliament next mentioned.

By an act of parliament of the sixth of George I, intituled "An act for annexing the late Duke of Shrewsbury's estate to the Earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement in order thereto, and \*for other purposes therein mentioned;" it was enacted [\*680] ed that certain large estates therein mentioned should, after failure of the issue male of certain persons, stand limited to the use of all and every person and persons being issue male of the body of John, first Earl of Shrewsbury, to whom the title, honor, and dignity of Earl of Shrewsbury should, by virtue of the letters patent of the creation of the earldom, descend and come, severally and successively, one after another as they and every of them should succeed to and inherit the earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons issuing, to attend and wait upon the said earldom, and to be annexed to and descend with the same; and it was enacted that neither any person nor the heirs male of the body of any person to whom any estate of inheritance in the estates should come by force of the act of parliament, should alienate any part of the estates, or do any act to the dishersion of the heirs inheritable, or persons entitled in remainder by virtue of the act; provided always, that no person nor the heirs male of the body of any person to whom any estate of inheritance should come by force of the act of parliament, who should, within six months after attaining the age of eighteen years, take the oaths appointed to be taken, instead of the oaths of supremacy and allegiance by the act of the first William and Mary, intituled "An act for the abrogating the oaths of supremacy and allegiance, and appointing other oaths;" and also subscribe the declaration set down and expressed in an act of parliament, made in the thirteenth Charles II. intituled "An act for the more effectually preserving the King's person and government, by disabling papists from sitting in either house of parliament," to be by him or them made, repeated, and



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subscribed in the Courts of Chancery or King's Bench or Quarter  
 [\*681] Sessions of the county where he or they should reside, \*and who  
 should from thenceforth continue a Protestant until he or they attained the age of twenty-one years, should, after he or they should attain the said age, and while he or they continued a Protestant, be disabled from aliening the estates, but might alien the same as freely and absolutely as if the act had never been made.

The act of parliament gave to the persons who should succeed to the estates under the limitations therein contained powers of creating various charges, and of leasing, for three lives or twenty-one years, or for any term determinable on three lives, at the usual and accustomed rents.

The petition stated that the present Earl of Shrewsbury held the estates mentioned in the act of parliament, under the limitations therein contained, and that he had no issue male, and that in the event of dying without such issue, the infant petitioner, John Talbot, would succeed to the title, and would also succeed, under the act of parliament, to the estates before mentioned; that it would be for the pecuniary interest of the infant petitioner, John Talbot, that he should become a Protestant at the age mentioned in the act of parliament, and should afterwards continue a Protestant; but that the defendants Doyle and the Earl of Shrewsbury, under whose exclusive power and control the petitioner was now placed, were bound by the obligations of conscience, as members of the Roman Catholic persuasion, and were fully determined, to educate the petitioner in the religious tenets of the Church of Rome.

The petition was supported by affidavits, which, amongst other things, verified the statements made in the petition with respect to Mrs.  
 [\*682] Berkeley's not having been \*allowed to have proper access to her son, and by medical affidavits stating that it was essential to the female infant's health that she should have the benefit of her mother's care and attention.

Both petitions came on to be heard together.

Mr. Wakefield, Mr. Wigram, and Mr. Bagshawe, appeared in support of Mr. Doyle's petition.

Sir C. Wetherell, and Mr. G. A. Young, in support of the petition presented in the names of the infants, contended, that regard being had to the act of parliament before mentioned, the infant, John Talbot, ought to be so educated as that he should, at the age of eighteen, be sufficiently informed to be able to decide whether he would declare himself a Protestant or Roman Catholic. They referred to *Dillon v. Parker*, (a) *Wilson v. Lord John Townshend*, (b) *Duke of Beaufort v. Bertie*, (c) *Eyre v. Countess of Shaftesbury*, (d) *Powel v. Cleaver*, (e) *Lyons v. Blenkin*, (g) *Anon.* (h)

(a) 1 Swanst. 359.

(d) 2 P. W. 102.

(h) Jacob, 254, n. 264, n.

(b) 2 Ves. jun. 693.

(e) 2 Bro. C. C. 499; see p. 509.

(c) 1 P. W. 703.

(g) Jacob, 245.



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*Mr. Richards* appeared for Mr. and Mrs. Berkeley.

**THE LORD CHANCELLOR** :—There are two questions which I am called on to decide ; and I have formed an opinion so clearly upon each, that I think it quite unnecessary to take any further time to consider my decision.

The first question is as to the immediate custody of the female infant, and is entirely unconnected with any \*question raised as to [\*683] the education of the boy, and is confined within very narrow limits.

When the case was before me in the autumn, I had considerable reason to believe that there was much misapprehension in the mind of the mother as to her rights as mother ; and I thought it necessary to explain that in point of law, she had no right to control the power of the testamentary guardian. It is proper that mothers of children thus circumstanced should know that they have no right, as such, to interfere with testamentary guardians, and if, under the peculiar circumstances, I think it proper now to leave the child in the custody of the mother, it is not in respect of right in that mother, but it is in consequence of that power which the court has of controlling the power of testamentary guardians. It is not necessary for me to lay down any particular rules for the exercise of this power by the court, because I am now considering what is proper to be done upon an application made by the testamentary guardian himself ; and there can be no doubt that, upon such an application, the court will consider that its aid should be afforded.

Now I have first to consider the age of the child : that age is represented as between eight and nine years, an age at which much cannot be apprehended from leaving a child in the care of a mother not of the same faith, particularly when a governess has been provided for the child of the same faith as the father. I find not only the age, but a very strong preponderance of medical testimony, that the child is of very weak constitution, and though not afflicted with any dangerous disease, yet that there is a considerable tendency to dangerous disease. Then I have also an act of the father, which, though not binding, is entitled to the greatest attention, as being evidence of his desire that \*the female infant should remain with her [\*684] mother until she should have attained a certain age, and of his confidence that that would not be abused ; and that period has not yet arrived. I rely upon that as evidence of the confidence he felt that the child might, up to that age, remain in the custody of the mother, and that she would pay that attention to the education and health of the child which he desired. As to that the testamentary guardian (Mr. Doyle) thinks that there should be an alteration ; but I have a right to look at the opinions of that gentleman himself ; for I know that, when he first took upon himself to interfere, he did not think it necessary to take the child out of the mother's care. If, therefore, he was of that opinion in September, I must assume that he saw nothing in the religious education or care of the child which was a reason for interfering.

It is perfectly clear that since that time the event has taken place—it had

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indeed taken place before, but was not known to me, and I believe not known to him—that the mother has since contracted marriage; but there is nothing to show that anything is likely to result from that circumstance, to prevent the child being as properly attended to as before.

I think, therefore, that, under the present circumstances, the removal of the child is not expedient. I say nothing as to what my opinion might be upon any complaint which might be hereafter made, either as to education or otherwise; and in now refusing to make the order, I must state, that in leaving the child in the care of the mother, I do not supersede the authority of the guardian. The guardian is responsible to this court for the care of the child, and he must, therefore, have free access to the child, and must be considered as having the custody of the child, subject only to such [\*685] \*restriction as this court imposes. I think the best way will be to direct that petition to stand over.

Now with regard to the other petition, these considerations have no application whatever.

The first question is whether, there is any thing before me to show that the testamentary guardian of the boy has not duly executed the duties of that office. Now, as to that, nothing is stated, except that he has more or less consulted the wishes of the uncle of the boy. No complaint is made as to the manner in which the boy has been brought up and educated. Consider the situation of this child with respect to Lord Shrewsbury. He is not only his nephew, but he is the presumptive heir not only to Lord Shrewsbury's entailed estates, but also to all the other possessions Lord Shrewsbury may at present enjoy. Is it not according to the usual practice of the world that the expectant heir should be brought up with the person from whom he expects so much; that, as far as possible, he should be treated as the son of that person, and should look up to that person as his father? When I say this, I bear in mind that there is not a suspicion as to the mode in which the child is treated; and it was stated to me in the autumn, that it was the intention of Lord Shrewsbury to take with him a tutor for the boy. So far from Mr. Doyle having done any thing inconsistent with his duty, it is the course which, of all others, I should have expected him to adopt.

No reason is stated why the boy should be removed from school or remain at school; but the court will not, without a case made, interfere with the manner in which the testamentary guardian exercises his authority.

[\*686] *Prima facie*, he has a right to the possession of both \*children. He has a right to exercise his discretion. He has exercised his discretion, for the present. He thinks it more for the benefit of the child that he should be removed from school, and placed in the house of his uncle.

Then the question is, whether that peculiar circumstance which has been the subject of so much discussion is to regulate the mode of the boy's religious education. It is said there are circumstances of pecuniary benefit and property which ought to induce this court to educate him in a manner which, if

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it were my duty to interfere, I should find it very difficult to prescribe. In the first place, I find this child born of a Roman Catholic father, who, though he married a Protestant lady, did not, on that marriage, enter into any stipulation as to the faith in which his children should be brought up. I find the father, who had the power of regulating the method of bringing up his children, and of extending that power after his death, appointing, as testamentary guardian, a clergyman of the Roman Catholic Church, and I think it impossible that the father could more distinctly indicate his wishes as to the faith in which his child should be brought up. Although the father has not the power of regulating, after his death, the faith in which his child should be brought up, the court will pay great attention to the expression of his wishes, and he can exercise that power indirectly by appointing a guardian of that faith. When, therefore, a Roman Catholic father appoints a Roman Catholic guardian, there can be no doubt as to the father's intention; and if I were to interfere with the exercise of the guardian's discretion as to the faith in which the child should be educated, I should be doing an act of very great injustice. Nothing can be more dear to a father than regulating the religious education of his child; and if I were to interfere in the manner \*which is desired, I should adopt a course to [\*687] induce those dissenting from the established church to suppose that this court would interfere to control the education of their children; for if I were to do it for the purpose of the supposed pecuniary interest of a child, other questions might come before me as grounds for a similar interference. Now, Lord Eldon, in the case which Sir Charles Wetherell has referred to, (a) instead of expressing an opinion to the effect for which Sir Charles Wetherell contends, appears very strongly to have marked a distinction. He says, that the law is now changed, and that it is now lawful to educate a child in the Roman Catholic faith; and when he speaks of former times, he speaks of times when the vain attempt was made to influence the religion of families by penal statutes.

Now, then, if that be so, although I am not now meaning to lay down any rule which may be applicable to extreme cases, following the example of the wisest of those who have preceded me, and confining myself to the facts of the case before me, I have a Roman Catholic parent appointing a Roman Catholic guardian, and I am asked to interfere with that guardian upon this ground, namely, that by an act of parliament of George the First, the son will, in the event of Lord Shrewsbury having no male issue, be tenant in tail, but without power of alienation: but that act provides that if, when the child attains the age of eighteen years and a half, he shall do certain acts—I do not now allude to the alteration of the law, because it is not necessary—indicating that he professes the Roman Catholic faith, and shall continue in that faith until twenty-one, then that fetter shall fall off, and he shall have the same \*power as any other [\*688]

(a) Anon. Jac. 254, n. 265, n.

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person who is tenant in tail of an estate; and I am asked, on the ground of the supposed privilege the child will have as a Protestant, to interfere with the testamentary guardian in the child's education.

Now the first question is, whether any pecuniary benefit will induce the court to interfere with that course of education which the father has pointed out. If the court were ever to exercise that discretion, it would be very difficult to say what was to be the extent of pecuniary benefit which should require the court's interference—what was to be the price of the child's faith. It would be fraught with extreme danger; for if it is applicable to one description of Christians, it is applicable to another. It is sufficient, for the present purpose, to say, that, in my opinion, this case does not even raise the question; for this child will be as well off, as tenant in tail without the power of alienation, as he would be if he had that power: and, generally speaking, persons providing for their offspring are desirous of fettering their power of alienation as much as possible. I am not so sure that it would be for his benefit that he should be brought up a Protestant. I know that Lord Shrewsbury has powers of charging this estate, and also large possessions of his own; and this child is living with him as his expectant heir. I find Lord Shrewsbury has the power of leasing the estates at the old rent of the time of George the First. Taking that alone, I should, in all probability, be doing the greatest possible injury to the worldly interest of the child by doing that which is now asked, namely, by taking him from the custody of his father's testamentary guardian and educating him in a religion which, looking to the usual feelings of human nature, would have the effect of alienating him from the person from whom he has the greatest expectations.

[\*689] \*I wish to guard, however, against its being supposed that the religious faith in which this child is to be brought up is to be a matter of barter in this court.

The question which this court is asked to decide is a question whether the boy shall be brought up as a Roman Catholic or as a Protestant; because it is quite impossible that a child can be so educated as to keep him so aloof from one faith or the other as to enable him, at the early age of eighteen years and a half, to decide for himself which he will then adopt. Every one must admit that it would be the most fatal thing in this world for a child not to have a religious education; but my opinion is, that, in the present case, there is no ground whatever for raising any question before me upon that subject.

I should also observe that the father, when he appointed a Roman Catholic testamentary guardian, knew of the provisions of that act of parliament which has been referred to.

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The petition was dismissed without costs; Mr. *Wakefield* saying that, on the part of the respondents to the petition, he did not ask for costs.

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1839. — Burn v. Carvalho.

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**\*BURN v. CARVALHO.**

[\*690]

1839: July 12; December 7.

A. having goods in the hands of B. as his agent at a foreign port, and being under liabilities to C., by letter to C. promised that he would direct, and by a subsequent letter to B. did direct B. to deliver over the goods to D. as the agent of C. at that port. Before the delivery of the goods, a commission of bankrupt issued against A., under an act of bankruptcy committed while his letter was on its way to B., and the goods were delivered by B. to D. in ignorance of the bankruptcy: Held, that C. had a good title, in equity to the goods.

In the month of April, 1826, Antonio Pedro Fortunato carried on business, as a general merchant, at Liverpool, and Edward Burn and Alexander Callander Burn carried on business, as general merchants, in London, under the firm of James Burn & Company; and Fortunato was in the habit of making consignments of goods for sale to Andre da Cunha Rego, at Bahia, and of drawing bills of exchange upon Rego, in anticipation of the produce of the sale of the goods; and Rego was in the habit of accepting such bills. Fortunato, in the month of April, 1826, made arrangements with Burn & Co., by which they were to indorse and negotiate the bills which he should draw upon Rego in respect of the consignments, and they were to credit him with the amount, and he was to draw upon them for it. Fortunato, having at different times, between the 20th of November, 1828, and the 14th of March, 1829, made consignments to Rego of goods to the amount of 3800*l.*, drew bills of exchange, from time to time, upon Rego, in respect of such goods, and transmitted such bills to Burn & Co., by whom they were indorsed and negotiated. Two of such bills, viz. for 400*l.* and 500*l.*, were drawn on the 29th of November, 1828, by Fortunato, and were by him transmitted to Burn & Co., by whom they were indorsed and negotiated. They credited Fortunato with the amounts, and he drew upon them in respect of those amounts, and they honored his drafts. Other bills of exchange, for sums making, together with the two last mentioned, the sum of 3800*l.*, were subsequently drawn in the same manner, and indorsed and negotiated by Burn & Co., who credited Fortunato in "account with their amounts. The [\*691] bill for 500*l.*, dated on the 29th of November, 1828, was presented to Rego for acceptance on the 25th of January, 1829, and was dishonored by him; and on the 17th of February, 1829, the bill of the same date for 400*l.* was presented to Rego for acceptance, and was also dishonored. Both bills were, however, under protest, by J. F. Vogeler, an agent of Burn & Co. at Bahia.

On the 23d of March, 1829, Burn & Co. received intelligence of the refusal of Rego to accept the two last mentioned bills, and they, thereupon, on the same day, wrote, to Fortunato a letter, in the following terms:—"Sir,—On Friday last we negotiated your draft on Bahia at 34*d.*, and we carry the same to your credit in 500*l.* It is with the greatest concern we have now to inform you that we have this day received advices from Bahia that Mr.



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Andre du Cunha Rego had refused to accept your drafts on him of the 29th of November for 500*l.* and 400*l.*, which intelligence, as you may well conceive, has caused us no small degree of surprise and mortification, particularly as we cannot but be apprehensive that the same unlooked for fate may likewise await your subsequent drafts on him. We have, therefore, most earnestly to request that you will not lose one moment in putting Mr. Rego in such a situation as will enable him to pay your drafts, and that you will also resort to the necessary means to furnish us with funds sufficient to reimburse us for the amount of any of your drafts that may come back to us protested for non-payment, whenever you are aware of such being the case."

To this letter Fortunato replied, on the 25th of March, 1829, in a letter, saying: "It grieves me most bitterly the object of your favor of the [\*692] 23d, and at a time "when I am quite unprepared to act as it is both my wish and my duty: therefore I have to request of you to send back the protested drafts to your agent at Bahia, to have them accepted by Mr. Rego, allowing him an extension of time to liquidate; and as by this mode you will incur the inconvenience of a delay, I will give instructions to Mr. Rego to settle with your agents as the demands arise from the bills."

On the 4th of April, 1829, Burn & Co. wrote to Fortunato as follows:—"We were duly favored with your esteemed letter of the 25th ult., and in reply thereto we beg to observe that the bills Mr. Andre da Cunha Rego of Bahia refused to accept have not yet been returned to us, as it would have been quite irregular to have returned them merely for want of acceptance; but in case of non-payment on the day on which they become due, they are sure to be sent back, with necessary protests, as it is quite impossible for us or our agent to grant any extension of time, as we are not the holders of the bills, with whom alone rests the power of granting such an accommodation. As indorsees of the bills, they will, of course, come back upon us first; however, we most fervently hope that such an unpleasant event will not take place, and that Mr. Rego will duly pay them. We have too high an opinion of your honor to suppose for a moment that you would have drawn these bills without having the means necessary for their discharge in the hands of Mr. Rego; and therefore we have most earnestly to request that you will write to Mr. Rego, by the first vessel, with orders that in case he does not pay your drafts he will immediately hand over such property as he may have of yours, of an equivalent value to the bills not paid by him, to our agent Mr. J. F. Vogeler of Bahia, whom we have re- [\*693] quested to pay the bills for our house. Trusting that "you will do every thing to protect our interest in this affair, we are, &c., *James Burn & Co.*"

On the 9th of April, 1829, Fortunato replied by the following letter to Messrs. Burn & Co.:—"I was duly favored with your esteemed letter of the 4th instant, the contents of which I duly observe, and, agreeable to your instructions, will write to Mr. A. C. Rego, per brig Wavertree, to sail on the



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12th of this month, directing him to hand over to Mr. J. F. Vogeler property of mine in his hands to cover the amount of bills that eventually may not be paid: I say eventually, because I do still hope that some of them will be accepted, for the cause of Mr. Rego not having done so was the actual impossibility of realizing and collecting debts. I beg to assure you that I will do all that is due of me to secure your property, and you shall not be sufferers, in the least, on account of this unfortunate transaction, beyond some delay."

At the respective dates of the two last letters Rego had in his hands property, belonging to Fortunato, of the invoiced amount of 3625*l.* 0*s.* 2*d.*

On the 11th of April, the day on which Burn & Co. received the letter of the 9th, Fortunato wrote and sent to Rego the following letter:—"Dear Sir—I have engaged and made promise to Messrs. A. Burn & Co. that you should pass into the hands of their agent in your city, Mr. J. F. Vogeler, all the property which might exist in your hands on my account. You will arrange with that gentleman the mode in which this order may be carried into effect, with this understanding, that it is essential that the whole be done with perfect secrecy, for which I shall consider myself as very much obliged to you. It appears to me the best plan would be for \*you [\*694] to pay in the liquidated amounts as fast as the same are being received."

This letter was received by Rego at the end of the month of May, 1829; and on the 11th of June, 1829, he wrote to Messrs. Burn & Co. a letter, in which, alluding to Mr. Fortunato, he said: "The most essential reason which obliged me to refuse acceptance to the bills which that gentleman drew upon me on the 20th of November, and subsequent months, was the absolute stagnation of a great part of the goods which he consigned to me, of which there still exists great part in my possession, which I will deliver to Mr. J. F. Vogeler, in consequence of the order to do so which I have received from him, Mr. Fortunato, which delivery I intend effecting by the end of the current month, and in my next I will inform you of what further may have passed in this disagreeable matter."

On the 30th of June, 1829, Rego delivered to Vogeler the sum of 3635*l.* 0*s.* 2*d.* in goods belonging to Fortunato, and which had been in his (Rego's) hands at the time at which the letters of the 4th and 11th of April, were written. These goods were sold by Vogeler for the net sum of 2049*l.* 0*s.* 3*d.* Vogeler, however, paid, on account of Burn & Co., all the before mentioned bills, amounting to 3800*l.*, and Burn & Co. incurred expenses for brokerage, commission, and otherwise; and, after giving credit for the sum of 2049*l.* 0*s.* 3*d.*, there remained due to Burn & Co. from Fortunato a large balance, which, by the bill in the present cause, was alleged to be 2183*l.* 15*s.* 1*d.*

On the 9th and 11th of April, 1829, and at the time when the letter of the last mentioned date came to Rego's hands, he had in his possession other goods belonging \*to Fortunato of the value of 1200*l.*, which he [\*695] applied in payment of what was due to himself from Fortunato.

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On the 23d of June, 1829, however, a commission of bankruptcy issued against Fortunato, upon an act of bankruptcy committed by him on the 23d of May, 1829, and Custodio Pereiro de Carvalho, William Clare, and John Newsham were duly chosen assignees of his estate and effects, and the usual assignment was made to them.

In Hilary term, 1831, the assignees commenced an action of trover against Burn & Co. in the Court of King's Bench, to recover the sum of 2049*l.* 0*s.* 3*d.* being the amount of the proceeds of the goods placed by Rego in the hands of Vogeler; and they recovered a verdict, subject to the opinion of the court upon a special case, which was afterwards argued, and upon which judgment was given in favor of the plaintiffs at law,<sup>(a)</sup> with liberty to the defendants at law to turn the special case into a special verdict, which was done accordingly; and the Messrs. Burn having (by their then surviving partner) brought a writ of error in the Exchequer Chamber, the special case was re-argued there, and the judgment of the Court of King's Bench was affirmed on the 23d of June, 1834.<sup>(b)</sup>

The bill in this cause was then filed by Mr. E. Burn, the surviving partner in the house of Burn & Co., against the assignees, praying that it might be declared that Burn & Co. were entitled to the before mentioned goods of Fortunato, amounting to the invoice price of 3625*l.* 0*s.* 2*d.*, in the hands of Rego; and that the plaintiff was then entitled to the before mentioned sum of 2049*l.* 0*s.* 3*d.*; and that the defendants might be directed to execute proper releases of that sum to the plaintiff; and that the defendants might be restrained from entering up judgment and taking out execution in the action, and from commencing any other action or suit against the plaintiff touching the same matters.

To this bill the defendants put in a general demurrer, which upon argument, was overruled by the Vice-Chancellor, whose judgment was affirmed by the Lords Commissioners.<sup>(c)</sup>

After the answer to this bill had been put in, the plaintiff filed a supplemental bill, stating that, since the filing of the original bill, he had been compelled to pay to the assignees the before mentioned sum of 2049*l.* 0*s.* 3*d.*, which was still in the hands of the assignees; and that he had also paid to them the sum of 266*l.* 8*s.* for costs incurred in the action; and praying that the defendants, the assignees, might be decreed to repay the 2049*l.* 0*s.* 3*d.*, and that, if necessary, they might be declared to be trustees of that sum for the plaintiff.

The assignees, by their answer to this bill, repeated a submission which they had made in their answer to the original bill, that, at the time of the bankruptcy, no legal or equitable assignment of the goods had been made by Fortunato; and they also submitted that if any such assignment or any contract amounting to such assignment did exist, the goods were, at the time of

<sup>(a)</sup> See 4 B. & Adol. 382.<sup>(b)</sup> See 1 Adol. & Ellis, 883.<sup>(c)</sup> See 7 Sim. 109.

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the bankruptcy, with the consent of Burn & Co., or whoever else could be considered the true owners of the goods, in the possession of Fortunato, by his factor Rego; and that Fortunato was the reputed owner thereof, and had taken upon himself the sale, \*alteration, or disposition of the [\*697] same; and that by virtue of the seventy-second section of the bankrupt act, 6 G. 4, c. 16, the commissioners under the bankruptcy had power to sell the same: and the defendants claimed the same benefit of the statute as if they had pleaded it in bar to the original and supplemental bills.

Edward Burn afterwards became bankrupt; and a second supplemental bill was filed by Charles Bladen Carruthers and William Whitmore, as the assignees under his bankruptcy.

The parties entered into certain admissions in the cause, by which it was, amongst other things, admitted that it was impossible for Rego to have received notice of the letter of the 9th of April, before the act of bankruptcy was committed.

Upon the hearing of the original and supplemental causes before the Vice-Chancellor, on the 22d of February, 1839, his honor made a decree, declaring that the plaintiff, Edward Burn, was entitled to Fortunato's goods mentioned in the pleadings, for the purpose of their being applied to liquidate and satisfy to Edward Burn and the late Alexander Callander Burn, the sums of money due upon the bills of exchange indorsed by them, as mentioned in the pleadings; and declaring that the plaintiffs, Carruthers and Whitmore, were entitled, as against the defendants (Fortunato's assignees,) to the two sums of 2049*l.* 0*s.* 3*d.* and 1200*l.*, mentioned in the pleadings: and the decree ordered that Fortunato's assignees should repay to Burn's assignees the 2049*l.* 0*s.* 3*d.* The decree made no provision as to costs. the defendants consenting to abide by such order as to the costs of the suit, including the hearing before the Vice-Chancellor, as the Lord Chancellor should make.

\*The defendants now appealed from this decree, and prayed that [\*698] it might be reversed.

Mr. *Wigram* and Mr. *Richards*, in support of the decree, contended that the letters of the 9th and 11th of April, gave to Messrs. Burn a complete title to the goods; and, with respect to the question of order and disposition, they argued that, from the time at which those letters were written, the goods were not in the order and disposition of Fortunato the bankrupt; and that, even if they were in his order and disposition, they were not in his order and disposition with the consent of the true owners, for the true owners were the Messrs. Burn. They referred to the following authorities: *Row v. Dawson*,(a) *Yeates v. Groves*,(b) *Ex parte South*,(c) *Lett v. Morris*,(d) *Loveridge v. Cooper*,(e) *Douglas v. Russell*,(g) *In re Ship Warre*,(h) *Fitzgerald v. Stewart*,(i) *Watson v. The Duke of*

(a) 1 Ves. sen. 331.

(b) 1 Ves. jun. 280.

(c) 3 Swanst. 392.

(d) 4 Sim 607.

(e) 3 Russ. 1.

(g) 4 Sim. 524, and 1 Mylne &amp; Keene, 488.

(h) 8 Price, 269.

(i) 2 Sim. 333, and 2 Russ &amp; Mylne, 457.

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*Wellington*,<sup>(a)</sup> *Winch v. Keeley*,<sup>(b)</sup> *Lempriere v. Pasley*,<sup>(c)</sup> *Carpenter v. Marnell*,<sup>(d)</sup> *Bailey v. Culverwell*,<sup>(e)</sup> and the cases stated in Eden on the Bankrupt Laws.<sup>(g)</sup>

Mr. *Spence*, Mr. *Jacob*, and Mr. *Sharpe*, in support of the appeal, insisted that the question raised in this suit had been disposed of by the judgments of the Courts of King's Bench and Exchequer Chamber; and that equity did not give to agreements, such as had been made in this case, greater effect

than such agreements would have at law: and they contended that  
 [\*699] no general \*agreement, such as that relied on here, could have the effect of creating a specific lien on particular goods, of which there was no description; and that the letter of the 11th of April, even if it could be considered part of the contract, did not have the effect of giving the ostensible ownership of the goods, to Burn & Co. They cited *Fremoult v. De-dire*,<sup>(h)</sup> *Best v. Argles*,<sup>(i)</sup> *Ex parte Heywood*,<sup>(k)</sup> *Birley v. Gladstone*,<sup>(l)</sup> *Gladstone v. Birley*.<sup>(m)</sup>

Mr. *Wigram*, in reply, mentioned *Gardner v. Rowe*.<sup>(n)</sup>

**Dec. 7.—THE LORD CHANCELLOR:—**In this case, in which the question is, whether certain property which formerly belonged to a bankrupt Fortunato, now belongs to his assignees or to the plaintiffs, it has been decided, first by the Court of Queen's Bench, and afterwards by the Exchequer Chamber, that it passed by the assignment, and is now legally vested in the assignees; but as these decisions were founded upon grounds of strict law, and as the judges, who delivered their opinions, stated distinctly that the question of equitable title to the property was not included in the decision, but was left open for the consideration of a court of equity, I do not think that the question I have to decide is in any degree affected by what has so taken place at law. In that respect, the case stands in the same situation as did the case of *Best v. Argles*.<sup>(o)</sup> Looking at the facts, therefore, for the purpose of inquiring whether, at the time of the bankruptcy of Fortunato, his deal-  
 [\*700] ings with the plaintiffs had been \*such as to give to them, in the events which afterwards happened, an equitable title to the property in question, they appear to be shortly as follows:—

Fortunato, who carried on business at Liverpool, had been in the habit of consigning goods for sale to Rego, at Bahia, and of drawing upon him for the expected proceeds; and, for the purpose of realizing, in this country, the amount of the bills so drawn, he employed the firm now represented by the plaintiffs to negotiate these bills; in order to effect which, they indorsed them, and, having disposed of them, placed the amount to the credit of For-

(a) 1 Russ. &amp; Mylne, 602.

(d) 3 Bos. &amp; Pull. 40.

(h) 1 P. W. 429.

(l) 3 M. &amp; S. 205.

(o) 2 Crom. &amp; Mee. 394.

(b) 1 T. R. 619.

(e) 8 B. &amp; C. 448.

(i) 2 Crom. &amp; Mee. 394.

(m) 2 Mer. 401.

(c) 2 T. R. 485.

(g) pp. 207, and 270.

(k) 2 Rose, 355.

(n) 2 S. &amp; S. 346, and 5 Russ. 258.

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Fortunato, for which he drew upon them. Burn & Co. having heard that some of these had been refused acceptance by Rego, and, therefore, expecting that such bills, and the others they had so indorsed, would be returned to them and payment required of them, applied to Fortunato, in a letter dated the 4th of April, 1829, requesting him to write to Rego, by the first vessel, with orders, that in case he did not pay the drafts, he would immediately hand over such property as he might have of Fortunato's of an equivalent value to the bills not paid by him, to their agent, Mr. Vogeler, whom they had requested to pay the bills for their honor. In answer to this letter, Fortunato, in a letter to Burn & Co., dated the 9th of April, 1829, said, "Agreeably to your injunction, I will write to Mr. Rego per brig Wavertree, to sail on the 12th of this month, directing him to hand over to Mr. Vogeler property of mine in his hands to cover the amount of bills that eventually may not be paid;" and, accordingly, by a letter to Mr. Rego, dated the 11th of April, 1829, he gave the directions to him as follows:—"I have engaged and made promise to Messrs. Burn & Co., that you should pass into the hands of their agent in your city, \*Mr. Vogeler, all the property which might [\*701] exist in your hands on my account."

By a letter of the 11th of June, 1829, Mr. Rego, informed Messrs. Burn (after stating that great part of the goods which Fortunato had consigned to him remained in his possession) that he would deliver such goods to Mr. Vogeler, in consequence of the order so to do which he had received from Fortunato.

On the 30th of June, 1829, the goods in question were accordingly delivered over by Mr. Rego to Mr. Vogeler, and were afterwards sold by him, but did not produce sufficient to meet the bills which Messrs. Burn had so indorsed; but, after applying such proceeds, they remained creditors of Fortunato, upon that account, to a considerable amount.

On the 23d of June, 1829, a commission of bankrupt issued against Fortunato; and he was found bankrupt upon an act of bankruptcy of the 23d of May preceding; and the judgment which has been obtained is in an action of trover by his assignees against the plaintiff Burn, for the value of the goods so delivered by Rego to Vogeler.

It was admitted that there was not a possibility of informing Mr. Rego, of the letter of the 9th of April, 1829, before the act of bankruptcy on the 23d of May.

The result of this state of facts, which I have taken from the admissions, is that Fortunato, being under pecuniary obligations to the plaintiffs, and having property in the hands of Rego his agent, promised and agreed to apply such property or a sufficient part of it to the discharge of such liability, and sent directions to Rego for that purpose, but became bankrupt before such instructions \*did or could have reached Rego; and the [\*702] question is whether such promise and agreement did not give to the plaintiffs a right in equity to have such property so applied, notwithstanding



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the intermediate bankruptcy of Fortunato ; and the inquiry is, first, whether the plaintiffs acquired any such right against Fortunato ? secondly, if they did, whether such right can be enforced against his assignees ? As to the first, I think it irrelevant to involve the case in any consideration of what rights at law the plaintiffs acquired by this arrangement with Fortunato ; the rules of law and equity being known not to be the same upon this subject. I propose, therefore, to inquire only into the authorities in equity.

In equity, an order given by a debtor to his creditor upon a third person, having funds of the debtor to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund.

In *Row v. Dawson*,<sup>(a)</sup> Lord Hardwicke says, “ It is a credit on the fund, and must amount to an assignment of so much of the debt ; and, though the law does not admit an assignment of a *chose in action*, this court does, and any words will do, no particular words being necessary thereto : ” and in

*Yeates v. Groves*,<sup>(b)</sup> Lord Thurlow says, “ This is nothing but a direction by a man to pay part of his money to another for a valuable consideration. If he could transfer, he has done it ; and it being his own money, he could transfer. ” In *Ex parte South*,<sup>(c)</sup> Lord Eldon says, “ It has been decided in bankruptcy that if a creditor gives an order on his debtor to pay a sum in

discharge of his debt, and that order is shown to the debtor, it binds [\*703] him. On the other hand, this doctrine has been brought into doubt

by some decisions in the courts of law, which require that the party receiving the order should, in some way, enter into a contract. That has been the course of their decisions ; but is certainly not the doctrine of this court. ” In *Fitzgerald v. Stewart*,<sup>(d)</sup> and *Lett v. Morris*,<sup>(e)</sup> the same rule was acted upon ; and, in *Watson v. The Duke Wellington*,<sup>(g)</sup> Sir J. Leach thus defines an equitable assignment : “ In order to constitute an equitable assignment, there must be an engagement to pay out of a particular fund. ” Upon this principle it is that assignments of future freight and of non-existing but expected funds have been enforced in equity ; but this case is far within the limits of the principle ; for here there is an existing fund in an agent's hand, and there is a distinct contract to discharge the liability out of that fund, and to give directions for that purpose.

I think, therefore, that the letters of the 4th and 9th of April, 1829, amounted to an equitable assignment of the fund in the hands of Rego ; and, if so, how can the subsequent bankruptcy in June, upon an act of bankruptcy in May, destroy the effect of such equitable assignment ? The property in the hands of the assignees was certainly liable to this equity, unless some provision in the bankrupt acts interfere to prevent it. Indeed, in most of the cases I have referred to, the question arose between the party claiming the equitable assignment and the assignees of the debtor who gave it. It was

<sup>(a)</sup> 1 Ves. sen. 331 ; see p. 332.<sup>(b)</sup> 1 Ves. jun. 280 ; see p. 281.<sup>(c)</sup> 3 Swanst. 393.<sup>(d)</sup> 2 Sim. 333. (See S. C. 2 Russ. & Mylne, 457.)<sup>(e)</sup> 4 Sim. 607.<sup>(g)</sup> 1 Russ. & Mylne. 602 ; see p. 605.



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argued that the goods in the hands of Rego were in the order and disposition of Fortunato at the time of his bankruptcy, and that they, therefore, passed to his assignees; but this argument appears to be excluded \*by [\*704] the fifty-fourth and fifty-fifth admissions, as I must take it as a fact that there was no possibility of informing Rego of the equitable assignment before the act of bankruptcy. There is, therefore, the absence of the consent of the owner. The attempt to prove a case of fraudulent preference, I think, wholly fails.

I am, therefore, of opinion that the plaintiffs had a good title, in equity, to the goods delivered by Rego to Vogeler, and, consequently, that the Vice-Chancellor's decree is right.

The appeal must be dismissed with costs.[1]

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His lordship directed that the Vice-Chancellor's decree should give to the plaintiffs the costs of the suit.

[1] A. in India, being indebted to B. in England, directed C. & Co. his agents in London to hold a sum (equal to a lac of rupees,) at the disposal of B., as soon as C. & Co. should be in possession of funds, and informed B. of such directions: C. & Co. also acquainted B. that they had received and registered the order. A. subsequently consigned a ship to another agent, D., and directed him to apply the proceeds of the sale of the ship to the purpose of paying the debt owing to B., and spontaneously informed B. that the ship and freight would be available for his (A.'s) London accounts, and that B., amongst others, would be paid the lac of rupees thereout. It was held, that B. had not by the correspondence, upon which the plaintiff's case depended, acquired a lien upon the proceeds of the ship, and that it was competent to A. to countermand the order to his agents as to the application of such proceeds to the payment of B. Wigram, V. C: "Nothing I conceive, can be more clear than that instructions communicated by a principal to his own agent, to apply the property of the principal in payment of a particular creditor, do not *per se* give that creditor any lien upon the property in the hands of the agent. I think it equally clear, that the mere announcement by a principal, even to his creditor, that such an arrangement had been made by himself for the payment of the creditor's debt, would not alter the case, nor give the creditor a lien. It is clear that, notwithstanding such direction or communication, the property may remain under the dominion of the debtor. — I accede to the plaintiff's argument that where there is a good consideration for the lien, it is immaterial what may be the form of the transaction. It is only necessary that the transaction should be evidence of an agreement for a lien: the real nature of the transaction, and not the form of it, must, I apprehend, be regarded. — The case of *Burn v. Carvalho*, was relied upon as an authority in the plaintiff's favor. In that case the creditors requested the debtor to order Rego, the holder of the property of the debtor, immediately to hand over to the creditor's agent such property as Rego might have belonging to the debtor, equivalent in value to the amount of certain bills; in answer to which request, the debtor promised that he would write to Rego and direct him to hand over to the creditor's agent property of the debtor to cover the amount of the bills which might not eventually be paid. Lord Cottenham describes this as the result of the state of facts before him, and says,—'The question is whether such promise and agreement would not give a lien in equity;' and he decides that the letters containing the request and the promise, amounted to an equitable assignment of the fund in the hands of Rego. That was a promise to pay out of a particular fund, in answer to an application for payment out of that very fund. I do not conceive that Lord Cottenham meant to decide anything more in that case, than that, where you make out the agreement to give the lien, the form of the transaction is not material." *Malcolm v. Scott*, Hare, 39, 46, 52, and see *Cotesworth v. Stephens*, 4 Hare, 185.



AN  
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TO  
THE PRINCIPAL MATTERS  
CONTAINED IN THIS VOLUME.

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**ACCOUNT.**  
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**ACCOUNTS.**  
*See* **PARTNERS, 4.**

**ADVANCE (TO PLAINTIFF OUT OF  
FUND IN COURT.)**

The plaintiffs claimed, as next of kin of an intestate, a fund which was in the possession of the defendant as the nominee of the Crown, and after the master had reported against the plaintiff's title, the court directed certain issues for the purpose of trying it. The plaintiffs applied for an advance out of the fund, for the purpose of enabling them to try the issue, but this, which was opposed by the Crown, the court refused. *Nye v. Maul, 342.*

**AGENT.**  
*See* **SPECIFIC PERFORMANCE, 1.**

**AGREEMENT (SET ASIDE.)**

Agreement obtained by a surgeon from a deceased patient set aside, upon the ground that the court was satisfied that the patient never did agree to or intend to direct what in the alleged agreement he was represented as agreeing to and directing, and that his signature, if genuine, must have been obtained by fraud, or under such circumstances as rendered it the duty of a court of equity to protect the patient and his estate from being prejudiced by it.

This relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another. *Dent v. Bennett, 269.*  
*See* **CONTRACT.**

**ALIEN.**

A testatrix devised a real estate to trustees, upon trust to sell, and to divide the produce of the sale amongst certain persons, some of whom were aliens. The estate was sold under a decree of the court. Held, that the Crown was not entitled to those shares of the produce of the sale which were payable to the aliens. *Du Hourmelin v. Sheldon, 525.*

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**APPORTIONMENT.**

The apportionment act, 4 & 5 W. 4, c. 22, does not apply to rents payable by tenants from year to year, which have not been reserved by an instrument in writing. *In re Markby, 484.*

**ASSETS.**  
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**ASSIGNMENT.**  
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**ASSIGNMENT (EQUITABLE.)**

A. having goods in the hands of B. as his agent at a foreign port, and being under liabilities to C., by letter to C. promised that he would direct, and by a subsequent letter to B. did direct B. to deliver over the goods, to D., as the agent of C. at that port. Before the delivery of the goods, a commission of bankrupt issued against A., under an act of bankruptcy committed while his letter was on the way to B., and the goods were delivered by B. to D. in ignorance of the bankruptcy; Held, that C. had a good title, in equity, to the goods. *Burn v. Carvalho*, 690.

**ATTACHMENT.**

See PRACTICE, 15 & 22.

**AWARD.**

Award held bad, and set aside; first, because the arbitrators had awarded on a matter which was not referred to them, and what they had so awarded without authority could not be separated from the other parts of their award; secondly, because they had declined to arbitrate upon certain matters included in the reference.

Principles of the court in dealing with awards. *Bowes v. Fernie*, 150.

**BANK (JOINT STOCK.)**

See JOINT STOCK COMPANY.

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See ASSIGNMENT (EQUITABLE.) ORDER AND DISPOSITION. SET OFF.

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**CANAL SHARES.**

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See PATENT RIGHT, 3.

**CHARGE.**

See COVENANT TO SETTLE.

**CHARGE OF DEBTS AND LEGACIES.**

See TRUSTEES RECEIPTS DISCHARGES, 1 & 2.

**CHATTELS.**

A., the owner of certain chattels, pledged them to B., who was a broker, to secure advances made on his behalf by B.; and B. afterwards, in his own name, and unknown to A., repledged the same chattels to C. to secure advances made by C. to B., but of which, unknown to C., A. was to have the benefit. C. having subsequently applied in vain to B. for payment of his advances, threatened to realize his security by a sale, which, however, he was from time to time induced to postpone, by the solicitations of B., and his assurances of speedy

payment; and this was communicated by B. to A., his principal. In a suit by A. against B. and C., praying to redeem the property in pledge on payment of any balance found due on the account between himself and B., it was held that A. had no equity to restrain C. from proceeding to an immediate sale. *Nicholson v. Hooper*, 179.

Whether under the circumstances above mentioned, C. could make a good title to a purchaser. *Quære. Ibid.*

See ASSIGNMENT (EQUITABLE) SEPARATE USE, 3.

**COMMISSION TO EXAMINE WITNESSES.**

See PRACTICE, 21.

**CONCEALMENT.**

See TITLE, 1.

**CONSIDERATION.**

See SETTLEMENT (VOLUNTARY.)

**CONSIGNEE.**

The appointment of a defendant, who is an executor and trustee, to be a consignee, with the usual profits, is a matter for the discretion of the court; but when such a discretion has been exercised, and an appointment made under it has been acted upon, the court will not afterwards withdraw its sanction from the appointment so made. *Morrison v. Morrison*, 215.

**CONTRACT.**

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**CONVERSION.**

See WILL (CONSTRUCTION OF,) 3. EXECUTORS. TENANT FOR LIFE. REMAINDERMAN.

**CONVEYANCE.**

When an estate has been sold under a decree, and all proper parties have been ordered to join in the conveyance to be settled by the master, if a party to the suit whom the master considers a proper party to the conveyance, refuses to convey, the right course for the purchaser to take is, to move, against that party, that he be ordered to convey; and not to move against the plaintiffs, that they be ordered to procure him to convey. *Stilwell v. Mellerish*, 581.

**COSTS.**

1. A bill was filed by persons interested as residuary legatees under a will against the executors and the other persons having interests, praying the usual accounts and the administration of the estate. The executors put in their answer, not however setting out the accounts which the bill asked. Afterwards, under an arrangement to which all parties consented, the executors verified their accounts by affidavit, and the sums thereby appearing to be in their hands were paid into court in the cause. Two of the defendants then filed a second bill against the executors and against all the other parties to the former suit and there-

by, in addition to the relief prayed by the first bill, sought to charge the executors personally, on the ground of fraud and breach of trust. In May, 1835, a decree by consent was made in the first suit, by which all the accounts and inquiries usual in an administration suit were directed. The plaintiffs in the second suit afterwards brought on their suit to a hearing, but wholly abandoned the case of alleged fraud and breach of trust: and a decree was made dismissing their bill, but directing that their costs, up to the date of the decree in the first suit, should be taxed and paid out of the fund in court in the first suit.

Upon appeal, this decree was varied, by directing that so much of the second bill, as sought to charge the executors personally, be dismissed with costs, and that the plaintiffs pay to all the defendants so much of the costs of the rest of the suit as had arisen since the decree in the first suit, and that the residue of the costs of all parties be taxed; with a declaration that the same ought to be paid out of the estate; any of the parties to be at liberty to apply in the first suit relative thereto, and all proceedings in the second suit to be stayed.

The decree involved so much of principle, especially with reference to the dealing with the fund in the first cause, for the purposes of costs in the second, as to render the appeal an exception to the ordinary rule which prohibits appeals merely on the question of costs. *Taylor v. Southgate*, 203.

2. The costs of the suit, which the order of the court below had thrown exclusively on the excess of accumulations arising from the annual produce of the trust estate, after the period allowed by the Thelluson act, were, upon appeal, directed to be paid out of the general estate of the testator, including the fund accumulated within the permitted period, except the costs incurred in the separation of the excessive accumulation, which costs were directed to be paid out of such excessive accumulations.

An appeal against such an order is an exception to the ordinary rule prohibiting appeals merely upon costs. *Eyre v. Marsden*, 231.

3. Order varied, on appeal, as to costs, in a case in which they formed the sole subject matter of the appeal.

Consideration of the circumstances under which the court will entertain appeals limited to the question of costs. *Angell v. Davis*, 360.

4. Persons, not parties to the suit, but intervening before the master, and making out their claims as next of kin of an intestate, whose estate is administered in the suit, and afterwards appearing at the hearing on further directions, ought to stand on the same footing in regard to their costs of these proceedings, as other next of kin who have been made parties. *Hutchinson v. Freeman*, 490.

5. Persons who, as members of a very numerous class, were interested in a residuary estate administered in a suit, but who were not parties to the suit, were allowed their costs of proceedings in the master's office to establish their claims, and of their subsequently intervening in the suit, and applying for such costs, in like

manner as other members of the same class who had been made parties. *Shuttleworth v. Howarth*, 492.

See PATENT. PRACTICE, 15, 16. SOLICITOR-TAXATION.

#### COSTS (APPEAL FOR.)

See COSTS, 1, 2, & 3.

#### COSTS (SUBPÆNA FOR.)

See PRACTICE, 15.

#### COSTS (TAXATION OF.)

See TAXATION OF COSTS.

#### COPYHOLD.

See ESTATE TAIL.

#### COURT OF DEALING.

See ST. CROIX.

#### CÖUSINS.

A bequest to the testator's "first cousins or cousins german," does not include the descendants of first cousins. *Sanderson v. Bayley*, 56.

#### COVENANT TO SETTLE.

1. A covenant to settle on particular persons all the covenantor's personal estate, subject only, nevertheless, and without prejudice to any other dispositions, qualifications, or changes, which he should make by his will of or concerning the same or any part thereof, is only a provision for a case of intestacy, and does not prevent the covenantor from bequeathing the whole of his personal estate to other persons. *Stocken v. Stocken*, 95.
2. *Semble*, that if a person covenants that he will, on or before a certain day, secure an annuity, by a charge upon freehold estates or by investment in the funds, or by the best means in his power, such covenant will create a lien upon any property to which he becomes entitled between the date of the covenant and the day so limited for its performance. *Wellesley v. Wellesley*, 561.

#### CUSTODY.

See PRACTICE, 15.

#### DEBT.

See LIMITATIONS, STATUTE OF. PARTNERS, 2, 3. ORDER AND DISPOSITION.

#### DEBTS (CHARGE OF.)

See TRUSTEES' RECEIPTS, DISCHARGES.

#### DECREE (FORM OF.)

1. The bill stated that an account had been made out, showing that a certain sum was due to the plaintiff, and it alleged that the defendants set up that account and the payment of the balance, as a final settlement. The bill charged the contrary, and that much more was due to the plaintiff, as would appear if certain accounts were rendered. A deed of

release had, in fact, been executed by the plaintiff, at the time of the payment of the balance in question; but the bill made no mention of it. As this deed of release acknowledged the receipt of certain sums, it could not be wholly set aside; but the court was of opinion, under the circumstances of the case, that it did not deprive the plaintiff of his right to the accounts which he sought. *Semble*, that the proper form of the decree in such a case is to declare that the plaintiff is entitled to the accounts, notwithstanding the provisions of the deed of release; but a decree which directed the accounts without noticing the deed of release, was not considered to require alteration. *Wedderburn v. Wedderburn*, 41.

### DECREE (INROLMENT OF.)

See PRACTICE, 23.

### DECREE (FOR ACCOUNT.)

See SUIT IN SCOTLAND.

### DEMURRER.

A demurrer to a bill having been put in, on two grounds, viz. want of equity and want of parties, the judge was of opinion that it was good, as a demurrer for want of parties, though not as a demurrer for want of equity. An order was therefore made, which allowed the demurrer, but gave leave to amend. The bill was amended accordingly.

The defendants, who had demurred, afterwards presented a petition of appeal to the Lord Chancellor against this order; but before the appeal was heard, they demurred to the amended bill. Under these circumstances, the Lord Chancellor dismissed the appeal with costs. *Wellesley v. Wellesley*, 554.

Observations upon the form of drawing up an order upon demurrer, in a case where the court is of opinion that one of two grounds of demurrer is good, and the other bad. *Ibid.*  
See PARTIES, 1, 2, 5. PRACTICE, 17. JOINT STOCK COMPANY. AMENDMENT.

### DEVISE.

1. Devise of real estate to trustees upon trust for the testator's son W. for life, and after his decease, to the heir male of his body begotten of an European woman, and the heirs of such heir male; and in case his son should die without leaving such heir male of his body, the trustees to pay the rent equally between the testator's daughters, M. and A., for their lives, and the whole to the survivor; and after the decease of the survivor, upon trust for the heir male of the body of M. and the heirs of such heir male, and in default of such heir male of her body upon trust for the heir male of the body of A. and the heirs of such heir male. W. and M. both died without issue, and A., having a son, suffered a recovery of the devised estate, and resettled it to new uses, under which a remote interest was limited to the surviving trustee, and died, leaving her son surviving, who who thereupon filed his bill against the survi-

ving trustee of the will for a conveyance of the legal estate.

Decree made against the trustee with costs: the court holding clearly that, under the devise, A. took a life estate only, with remainder to her son in fee. *Willis v. Hiscar*, 197.

2. A testator gave and bequeathed to his son R. (who was his heir at law) his freehold land in D., and directed that the residue of the property which he might leave at his death, should be divided between that son and his two sisters in equal proportions; with a direction, that whatever portion might devolve to him should be placed in the names of trustees, and the interest paid to him during his life, and that after his death, his share should be divided between his children and placed in the names of trustees, with a discretionary power to employ a portion of the capital for their advancement; and on the children respectively attaining twenty-five, their shares to be transferred to them. Should his son die without issue, the whole of his portion was to devolve to his two sisters, during their lives, in equal proportions; and after their deaths, to their children: Held, first, that under the terms of this devise, the son took only a life estate in the freehold land in D.; and, secondly, that, under the residuary clause, the reversion in fee of the land passed in equal undivided thirds, subject to the same trusts and limitations as the other residuary property, for the benefit of the testator's son and daughters, and their respective children. *Saumarez v. Saumarez*, 331.

See ESTATE TAIL. 'TRUSTEES' RECEIPTS, DISCHARGES.

### DISMISSAL OF BILL.

See PRACTICE, 10.

### DOMICIL.

See PROBATE.

### EDUCATION.

See JURISDICTION, 4.

### ELECTION.

See WILL (CONSTRUCTION OF.)

### ESTATE FOR LIFE.

See DEVISE, 3.

### ESTATE FOR LIFE, OR IN TAIL.

See DEVISE, 1.

### ESTATE TAIL.

Devise of a copyhold to trustees and the survivor of them, and the executors and administrators of such survivor for ever, upon trust out of the rents and profits, to pay certain yearly charges, and the residue to T. for life; and from and after his decease, to pay the residue as aforesaid to T.'s children, and so on for ever; and for want of children lawfully begotten, to the testatrix's daughters: Held, that T. took an equitable estate tail under this devise. *Trash v. Wood*, 324.

T. received the rents during his life, but, having an equitable estate only, was not admitted



tenant of the copyhold, and died, leaving several sons. The custom proved, with respect to the descent of copyholds within the manor, was that upon the death intestate of a tenant seized of an estate of inheritance, his younger son was his customary heir: Held, that the youngest son of T., and not the eldest, became entitled, on his father's death, to call for a conveyance of the copyhold, as tenant in tail under the devise. *Ibid.*

**EVIDENCE.**  
See PRACTICE, 1.

**EXCEPTIONS.**  
See PRACTICE, 6, 7, 8.

**EXECUTORS.**

Executors, whose testator was the assignee of a leasehold estate, of which the rent was greater than its yearly value, were ordered by the court to take such steps as might be necessary to relieve the testator's estate from liability in respect of the rent and covenants of the lease. The executors endeavored to prevail upon the lessor to accept a surrender, but he refused to do so; and they took no other steps towards complying with the order.

Held, that the executors ought to have assigned the lease to some other person; and that, not having done so, they were bound themselves to exonerate the testator's estate from the liabilities to which it had been subject in respect of the lease since the time at which they might have made such an assignment. *Rowley v. Adams*, 534.

See CONSIGNEE. CONVERSION. LEASEHOLD. PARTNERS.

**FEME COVERT.**  
See SEPARATE USE. TRUSTEE AND CESTUI QUE TRUST.

**FIRST COUSINS.**  
See COUSINS.

**FOREIGN COURT.**  
See SUIT IN SCOTLAND.

**FRAUD.**  
See AGREEMENT (SET ASIDE.)

**FREIGHT.**  
See ORDER AND DISPOSITION.

**FUND IN COURT.**  
(Payment of income of.)  
See PRACTICE, 19.  
(Advance out of.)  
See ADVANCE.

**GOODS.**  
See ASSIGNMENT (EQUITABLE.) CHATTELS.  
(GUARDIANS TESTAMENTARY.)  
See JURISDICTION, 4.

**IMPERTINENCE.**  
See PRACTICE, 22.

**INFANTS.**  
See PRACTICE, 11.

**INFORMATION.**  
See PRACTICE, 13.

**INJUNCTION (COMMON.)**  
See PRACTICE, 9, 18.

**INJUNCTION (SPECIAL.)**

When the court has interfered in aid of a legal right, by granting an injunction, upon the terms of the plaintiff's bringing an action, it will deprive the plaintiff of the injunction, if he does not commence and proceed with his action with due promptness; but it will not do this if the defendant has been supine in the cause. *Bickford v. Skewes*, 498.

See CHATTELS. JURISDICTION, 2. PATENT RIGHT, 1, 2. PRACTICE, 18. SUIT IN SCOTLAND. TITLE.

**INJUNCTION (BREACH OF.)**

If a party who together with others, has been restrained by injunction from doing a particular act, is afterwards present, aiding and abetting, when that is done which the injunction has prohibited, he is guilty of a breach of the injunction. *St. John's College, Oxford, v. Carter*, 497.

**INROLMENT.**  
See PRACTICE, 23.

**INTEREST (OF FUND IN COURT.)**  
See PRACTICE, 19.

**INTERLOCUTORY APPLICATION.**  
See PAYMENT INTO COURT. PARTNERS, 4. PATENT RIGHT, 1, 2. TRIAL AT LAW. PRACTICE, 20.

**INTERPLEADER.**

One of several part owners of a ship acting as ship's husband, directs a broker to effect an insurance upon the entirety of the ship. A loss happens, and the insurance money being paid to the broker, who knew what other persons were part owners of the ship, one of the other part owners demands payment of his proportion of the insurance money, and commences an action against the broker to recover it; and the part owner who directed the insurance demands payment of the whole, and commences an action to enforce such demand: Held, that the broker could sustain a bill of interpleader against the two claimants. *Suert v. Welch*, 305.

**IRREGULARITIES.**  
See PRACTICE, 11.

**JOINT WILL.**  
See WILL (JOINT.)

**JOINT STOCK COMPANY.**

Bill by some of the shareholders of an insolvent

joint stock bank, established under the acts 7 G. 4, c. 46, and 3 & 4 W. 4, c. 83, on behalf of themselves and all other shareholders except the defendants, against the directors, some of whom had become bankrupt, and the trustees and public officer of the company, and certain shareholders, who were alleged to have not paid up their calls, praying that an account might be taken of all the partnership assets, and that such part as was outstanding might be got in by a receiver, and that the whole might be converted into money, and applied towards satisfaction of the partnership debts:

Demurrer, for want of equity, want of parties, and multifariousness, overruled. *Walworth v. Holt*, 619.

See PARTIES, 3, 4.

### JUDGMENT CREDITOR.

See SEPARATE USE, 3.

### JURISDICTION.

1. The Court of Chancery has jurisdiction to prevent the town council of a borough from abusing the power given to them by the act 5 & 6 W. 4, c. 76, of awarding compensation for the emoluments of offices; and no difference in this respect is made by the circumstance that the compensation is about to be raised by means of a rate.

Whether compensation can, under that act, be given for the emoluments of an office which the officer has voluntarily resigned, *quære*

*Semble*, that in estimating the amount of compensation, the emoluments of offices dependent upon that which gives the right to compensation may be considered. *Attorney General v. Corporation of Poole*, 17.

2. Principles upon which the court will exercise its jurisdiction over bodies to whom parliament has given powers of making compulsory purchases of land.

*Semble*, that the court will not allow such bodies to avail themselves of their parliamentary powers, by taking land which they do not require for a *bona fide* purpose sanctioned by their act of parliament.

*Semble* also, that although an attempt to obtain possession of land has been, in the first instance made under color of the powers of the act of parliament, when not really required for the *bona fide* purposes of the act, yet if the land afterwards becomes really necessary or desirable for such *bona fide* purposes, the court will not interfere to prevent its being taken. *Webb v. Manchester and Leeds Railway Company*, 116.

2. Principles of the court's jurisdiction over public functionaries. *Frewin v. Lewis*, 249.
3. Jurisdiction of the court in controlling the powers of testamentary guardians.

The circumstance that it will be more for the pecuniary interest of a child to be educated in one religious faith than in another, will not induce the court to interfere with his religious education.

And, *semble*, the court will not interfere with the discretion of the testamentary guardian to

the faith in which he educates his ward, particularly if that faith be the faith which the ward's father professed. *Talbot v. The Earl of Shrewsbury*, 672.

See PRACTICE, 4. STATUTES (CONSTRUCTION OF.)

### LEASEHOLDS.

See EXECUTORS. REMAINDERMAN. TENANT FOR LIFE. WILL (CONSTRUCTION OF,) 3.

### LEGACY.

A testator, by his will, dated in 1832, gave to three trustees, upon certain trusts, a sum of 15,000*l.* interest or share in the three per cent. consols, to be deemed a legacy of quantity, and to be due at his decease, as if the same were a specific legacy; and he directed that if he should not die possessed of three per cent. consols sufficient to satisfy the said sum of 15,000*l.* consols before bequeathed, then his executors should, within two months after his decease, purchase so much annuities in that fund as should make up the deficiency; and should raise the money required for that purpose out of his real estate. He created a term in his real estates, one trust of which was to raise the full amount, or, as the case might require, the deficiency of the said sum of 15,000*l.* three per cent. consolidated bank annuities, in case he should not have at the time of his decease sufficient three per cent. annuities in that fund to answer that legacy. At the time of the testator's death in 1835 he had 3000*l.* consols standing in his name which had been purchased in 1834; but he had in 1824 sold out 12,000*l.* consols, which then stood in his name, and paid the produce to his brother, who had mortgaged to him a freehold estate, subject to a proviso for redemption upon retransfer into his (the testator's) name, when requested so to do, of 12,000*l.* consols, and payment of interest equal to the dividends in the meantime, and had entered into a covenant for the retransfer in the terms of the proviso:

Held, that the 12,000*l.* consols secured by the mortgage, was well bequeathed to make up the legacy of 15,000*l.* three per cent consols. *Collison v. Girling*, 63.

See ASSETS. TRUSTEES' RECEIPTS, DISCHARGES.

### LEGACIES (CHARGE OF.)

See ASSETS. TRUSTEES' RECEIPTS, DISCHARGES.

### LEGATEES.

See COSTS, 4.

### LENGTH OF TIME.

See TRUSTEE AND CESTUI QUE TRUST.

### LIABILITY.

See EXECUTORS.

### LIEN.

1. On a bill filed by a solicitor, seeking to establish a lien for costs upon a policy of assurance which a client had placed in his hands professionally, and upon which the court had,

in another cause, directed an action to be brought, a special injunction was obtained, restraining all proceedings upon the policy; but this injunction was dissolved, upon appeal; the Lord Chancellor holding that the plaintiff's proper course was to make an application in the other cause.

Whether such a lien could be enforced by suit; and if so, to what extent, *quære*? *Stedman v. Webb*, 346.

2. If a solicitor whom his client has ceased to employ, by the production of a deed in his hands belonging to the client, and upon which he claims a lien as solicitor, enables the client to recover a fund in a suit, his lien over the fund so realized is confined to the costs of that suit, but is a lien which he is entitled actively to enforce. *Secus* as to his general lien upon his client's papers, which applies to all his bills of costs, but is merely a right to retain the papers, and cannot be actively enforced. *Boxon v. Bolland*, 354.

See COVENANT TO SETTLE.

### LIMITATIONS (STATUTE OF.)

After the death of one of two partners, the survivor cannot set up the statute of limitations as a bar to a demand against the assets of the deceased. Whether the deceased's representatives can set up the statute, so long as the survivor continues liable to the payment of the debt, and the deceased's estate is consequently liable to be called upon by the survivor for contribution, *quære*. *Winter v. Innes*, 101.

### LUNATIC.

1. The ordinary repairs upon a lunatic's real estate will be directed to be borne by the personal estate; but any extraordinary outlay of the personal estate on the land, should retain its character of personalty. *In re Badcock*, 440.
2. In a competition between the brother and the wife of an alleged lunatic for the carriage of the commission, the Lord Chancellor gave a preference to the brother, on the ground that, in the particular case, the wife had an interest in preventing the proof of the lunacy being carried back beyond a certain period. *In re Whittaker*, 441.

### MAINTENANCE.

By a marriage settlement, personal estate was settled by the father of the wife, in trust for her for life, with remainder to her children, equally, as tenants in common, and in default of a child attaining a vested interest, in trust for the husband, with a direction that, after the wife's death, the trustees should apply the income, at their discretion, for the maintenance and education of the children during their minorities.

Held, that after the wife's death the husband was entitled to require that the income should be applied to the maintenance and education of the children, notwithstanding that he was himself of ample ability to main-

tain and educate them. *Stocken v. Stocken*, 95.

### MEDICAL ATTENDANT.

See AGREEMENT (SET ASIDE.)

### MORTGAGE.

See TRUSTEES' RECEIPTS, DISCHARGES. PLEDGE OF CHATTELS.

### MULTIFARIOUSNESS.

Where the case against one defendant is so entire as to be incapable of being prosecuted in several suits, but yet another defendant is a necessary party in respect of a portion only of that case, such other defendant cannot object to the suit on the ground of multifariousness.

*Attorney General v. Corporation of Poole*, 17.

See JOINT STOCK COMPANY.

### NEW ORDERS.

See PRACTICE, 2, 12, 22.

### NEXT OF KIN.

See COSTS, 4.

### NOTICE.

See ORDER AND DISPOSITION.

### ORDER AND DISPOSITION.

A., on behalf of the owner of a ship, entered into a charter party with B., by which B. agreed to pay to A., on the owner's behalf, a certain sum for freight. The owner afterwards assigned all the freight accruing under the charter party to C., as a security for a debt; and C. gave notice of the assignment to A. but not to B. The owner having subsequently become bankrupt, it was held that the arrears of freight were not in his order and disposition at the time of his bankruptcy. *Gardner v. Lachlan*, 129.

Where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assignee, is the party from whom the trader was to have received payment of the money; in other words, the party holding the property at the order and disposition of the trader. *Ibid.*

See ASSIGNMENT (EQUITABLE.)

### PARTIES.

1. Whether it is essential to the validity of a demurrer for want of parties, that it should point out who the necessary parties not before the court are, *quære*. *Attorney General v. Corporation of Poole*, 17.
2. Upon allowing a demurrer for want of parties, leave given to amend by striking out that part of the bill which rendered such parties necessary, 17.
3. To a suit by the directors of a joint stock company, on behalf of themselves and all other the shareholders, seeking to have the benefit of an agreement entered into by an agent of the company, it is not necessary that

all the shareholders should be made parties. *Taylor v. Salmon*, 134.

4. A person who sets up a title adverse to the company, may be properly made a defendant in such a suit, although he also sustains the character of a shareholder. *Ibid.*
5. A bill may be demurred to, as a whole, for want of parties, if any part of the relief prayed is such as cannot be granted in the absence of a person who is not made a party to the bill. *Lidbetter v. Long*, 286.

See DEMURRER. JOINT STOCK COMPANY. SPECIFIC PERFORMANCE, 2.

### PARTNERS.

1. By articles of partnership, between three persons, it was stipulated that, in case of the death of any one of them, the partnership should cease on a certain subsequent day, and the property of the partnership be then divided between the surviving partners and the executors of the deceased partner. One partner, by his will, directed all his property to be converted and invested for the benefit of his children, and appointed his co-partners his executors, and died, leaving his children all infants. The two surviving co-partners, having proved the will, had the property of the partnership valued, and then proceeded to continue the business under a new firm, and debited the new firm with the value of the testator's share of the partnership property, but did not otherwise execute the directions either of the articles or of the will: Held, that this transaction must be treated as a nullity, so far as the children's interests were concerned. *Wedderburn v. Wedderburn*, 41.
2. The executors of a testator, who were also his surviving partners, and had continued to employ his share of the partnership capital in trade, held answerable for a proportionate share of the profits of the trade, notwithstanding that the capital of the partnership at the time of the testator's decease consisted only of debts due to the partnership. *Ibid.*
3. The estate of one of two partners is not after his death discharged from a partnership debt by the circumstance that the creditor continues his transactions with the survivor, and forbears, for some years, at the survivor's request, to take any steps to enforce payment of his debt.  
*Secus*, where the transactions show that the creditor has accepted the liability of the survivor in discharge of the liability of the partnership. *Winter v. Innes*, 101.
4. The advances made by one partner to the partnership, and those received by another from it, until the concern has been wound up, only constitute items in the account between the partners, and cannot be treated as debts; and the court, therefore, will not, upon an interlocutory application, order the amount of such advances to be paid in and secured, pending a suit for taking the partnership accounts. *Richardson v. Bank of England*, 165.  
 See LIMITATIONS (STATUTE OF.)

### PATENT RIGHT.

1. In August, 1835, a patentee filed a bill to restrain an alleged infringement of his patent, and the defendant having by his answer denied the validity of the patent, and also the fact of the alleged infringement, the plaintiff made no interlocutory application for an injunction, but went into evidence in support of his case, and in May, 1839, brought the cause to a hearing. The Master of the Rolls, being of opinion that the plaintiff, upon the evidence, had not made out a case which would have supported an injunction if applied for in the interlocutory stage, refused to give him an opportunity of establishing his title at law by retaining the bill, with liberty to bring an action; and dismissed the bill with costs; and the Lord Chancellor, on appeal, affirmed this decision. *Bacon v. Jones*, 433.

Consideration of the principles and practice of the court in granting injunctions in patent cases, upon interlocutory motions and at the hearing. *Ibid.*

2. Although a patent is of long standing, yet if, from the nature of the alleged invention, or the conflicting evidence as to its novelty, its validity appears to be doubtful, or if the evidence of exclusive possession is not satisfactory, the court will not grant an injunction until the title has been established at law. *Collard v. Allison*, 487.

After the patentee had obtained a verdict in an action brought to try the validity of the patent, the court refused to grant an injunction to restrain the infringement of the patent, on the ground that a rule nisi for a new trial had been obtained and was pending in the court of law, and that the legal title of the patentee was therefore still undecided. *Ibid.*

3. A party, who had lodged an unsuccessful caveat against the granting of a patent, ordered to pay to the patentee the taxed costs occasioned by the caveat. *Semble*, such costs will be taxed upon the principle upon which costs in a cause are taxed as between party and party. *In re Cutler's Patent*, 510.

### PAYMENT INTO COURT.

1. Review of the principles upon which money is ordered to be paid into court in consequence of admissions made in a defendant's answer. *Richardson v. Bank of England*, 165.
2. When a plaintiff claims to be entitled, in a particular character, to a fund in the hands of a trustee, and the trustee, by his answer, says he does not know whether the plaintiff fills that character or not, the plaintiff cannot have the fund brought into court in the suit. *Dubless v. Flint*, 502.

See PARTNERS, 4.

### PERPETUITY.

See POWER, 2.

### PERSONAL ESTATE.

See LUNATIC.

### PETITION.

See PRACTICE, 4, 6.

## PLAINTIFF.

See **ADVANCE OUT OF FUND IN COURT. JURISDICTION**, 5. **PRACTICE**, 10, 13, 20.

## PLEADING.

See **JOINT STOCK COMPANY. MUTIFARIOUSNESS**.

## PLEDGE OF CHATTELS.

See **CHATTELS**.

## POWER TO SELL.

See **TRUSTEES' RECEIPTS, DISCHARGES**, 1, 2. **POWERS**, 2.

## POWER.

1. A husband, upon marriage, settled an estate to the use of himself for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of trustees for a term of years, to secure a jointure for the wife, with remainder to the use of such children of the marriage as the husband and wife jointly, or, in default of a joint appointment, the survivor of them should appoint, with remainder, in default of such appointment, to the children of the marriage, equally, with remainder to the right heirs of the husband. The husband became bankrupt, and, after his bankruptcy, he and his wife made a joint appointment in favor of two of the children of the marriage. The husband then died; and a bill having been subsequently filed by a person claiming under the bankruptcy, for an account of the rents of the settled estate, the wife thereupon executed a separate appointment in favor of the same children, which she stated in her answer:

Held, first, that the joint appointment was inoperative, on the ground that the husband could not, by a subsequent execution of the power, deprive his assignees of an estate which had been once vested in them by his bankruptcy; secondly (by implication,) that such joint appointment could not be considered as the separate appointment of the wife, who survived; and, thirdly, that the wife's separate appointment after the husband's death was a good exercise of the power; and that the account of the rents prayed by the bill could not be extended beyond the date of that appointment. *Hole v. Escott*, 187.

2. A testator, by his will, after disposing of three one-fifths of his residuary real and personal estate, gave another one-fifth in trust for his son William and his children; and the remaining one-fifth in trust for his daughter till twenty-five or marriage, with a direction, that if she married under that age, her fifth should be conveyed and settled upon the trusts therein mentioned; and he gave the trustees a general power of sale during the continuance of the trusts thereby reposed in them. William survived the testator, and died, leaving infant children: and, upon the daughter's marriage under twenty-five, a settlement was executed, which, reciting that no part of the real estate had been sold, although it was intended that the same should be sold under the power contained in the will, assigned to trustees, their

executors, &c all the daughter's share of the moneys to be produced by the sale of the real estate, upon certain trusts in favor of her intended husband, herself and her issue:

Held, as to William's fifth, that the power of sale under the will continued after his death; and that, although, as to the daughter's fifth, the power had determined upon her marriage, yet the settlement created a new power of sale by implication. *Wood v. White*, 460.

Whatever objections may exist to an indefinite power of sale, on the ground of its tending to a perpetuity, such objections will not prevent the valid exercise of the power during the continuance of limitations, which are within the prescribed legal limits: *Semble. Ibid.*

## PRACTICE.

1. The court will not, upon an interlocutory application, after the cause is set down for hearing, declare that at the hearing a particular document may be produced and read as evidence. *The Attorney General v. The Fishmongers Company*, 1.
2. A plaintiff applying for leave to amend, after replication, must give the court as much information as to the nature of the proposed amendments as the court requires upon an application for leave to amend a second time after answer. *Ibid.*
3. Whether it is necessary, and if so, in what cases, to obtain the leave of the court before filing a supplemental bill for the purpose of putting in issue matter discovered since the original bill was susceptible of amendment, *quære*. But if such leave is necessary, the application for it must give the court as much information as would be required for the purpose of obtaining leave to amend a second time after answer. *Ibid*, 1.
4. A petition which the court has no jurisdiction to entertain may be dismissed with costs; *Semble. In re Isaac*, 11.
5. N. was made a defendant to a cause as a creditor in respect of a debt which he had assigned to trustees, and to recover which he had given them power to use his name. The trustees were not themselves parties to the suit, but they obtained an order authorizing them to appear for him, and to use his name in all proceedings in the cause, and directing that all warrants and proceedings served on his clerk in court, should be forwarded to their solicitor. Held, that such an order was irregular. *Drever v. Mawdesley*, 94.
6. When the master has omitted to report upon one of the questions referred to him, it is irregular to present a petition praying a declaration upon that question. The right course is to except to the master's report. An order upon a petition may be a proper mode of supplying any omission in the directions which the decree has given to the master, but it cannot be the proper mode of supplying any defect or correcting any error in the report. *Winter v. Innes*, 101.
7. A part of an exception may be allowed unless it be so specially framed as to prevent such partial allowance. *Hoare v. Johnstone*, 127.



8. On the argument of exceptions to the master's report, an objection as to the admissibility of evidence may prevail, although it does not form the subject of an exception. *Ibid.*
  9. The common injunction having issued against one of two defendants for want of answer, the plaintiff afterwards, by an order of course, obtained leave to amend without prejudice to the injunction. Such an order, it seems, is not irregular; and, at any rate, cannot be impeached by the defendant against whom no injunction has issued. *Ferrand v. Hamar*, 143.
  10. A plaintiff may obtain the common order dismissing the bill with costs, at any time before the cause has been actually heard; and even after it has been called on for hearing. *Curtis v. Lloyd*, 194.
  11. The court will not suffer the proceedings in a cause to be impeached on the ground of irregularities of which the persons complaining have been themselves the authors; and if all persons interested in the subject matter of the suit have been substantially parties to all the subsequent proceedings, none of them can be permitted to escape from the effect of such subsequent proceedings, by showing prior irregularities; and no difference in this respect is caused by the circumstance that some of such parties are infant plaintiffs. *Morrison v. Morrison*, 215.
  12. After the six weeks limited by the 13th order of 1828, as amended in 1831 have expired, the master has no jurisdiction to entertain applications for leave to amend. *Lloyd v. Wait*, 257.
  13. A relator and plaintiff cannot be heard in person. *Attorney v. Barker*, 262.
  14. When a defendant, by his answer, admits the possession of books and papers relating to the matters in question, but states that they are in constant use in his business, and necessary for that purpose, the court only orders, in the first instance, that they shall be produced to the plaintiff at the place of business at which they are stated to be in use; leaving it open to the plaintiff, if he does not obtain a satisfactory inspection of them there, to apply to the court for a further order. *Grane v. Cooper*, 263.
  15. A subpoena for costs cannot be served upon a party who is in custody under an irregular attachment sued out by the party serving him with such subpoena.  
*Semble*, that the service would also be bad if the defendant was in irregular custody at the suit of any other person. *Hawkins v. Hall*, 280.
  16. The common undertaking upon an appeal, to pay such costs (if any) as the court shall think fit to award in respect of any proceedings had since the decree, applies only to costs incurred in the prosecution of the decree, and not to the costs of the appeal. *Price v. Dewhurst*, 282.
  17. When a demurrer for want of parties is allowed, with leave to amend, the plaintiff does by undertaking to amend, preclude himself from appealing against the allowance of the demurrer. *Lidbetter v. Long*, 286.
  18. If a defendant, in his answer, states portions of pleadings at law, but for greater certainty as to those pleadings refers to a copy thereof when produced, the plaintiff may, on a motion for an injunction, read the whole of such pleadings from a copy verified by affidavit. *Rawson v. Samuel*, 330.
  19. When a fund, the title to which is litigated in the cause, has been brought into court, it is contrary to the practice of the court to determine the question of title upon interlocutory application, so far as to direct that the interest of the fund shall be paid to one of the parties claiming it, until further order. *Nedby v. Nedby*, 367.
  20. A plaintiff, although appointed receiver in the cause, cannot, before decree, be ordered, as plaintiff, to produce books or accounts in his possession, for the inspection of a defendant. *Maund v. Allies*, 503.
- A party in possession, for the inspection cannot except by consent, be compelled to produce them for inspection elsewhere than before an officer of the court. *Ibid.*
21. An order for a commission to examine witnesses, returnable upon a day subsequent to which publication stands enlarged, with liberty to apply to the master to enlarge publication, is irregular. *Maund v. Allies*, 503.
  22. After an attachment against a defendant for want of his answer has been sealed, he cannot refer the bill for impertinence; and if the attachment bears date on the same day as the order of reference it will take precedence of the order. *Petty v. Lonsdale*, 545.  
*Semble* also, that the order of reference will not stand unless it be not only obtained but served before the date of the attachment. *Ibid.*
  23. The enrolment of a decree or order will not be stopped by an appeal, if the order setting down the appeal is not served before the enrolment is made. *Deerman v. Wyck*, 550.
- See CONVEYANCE. RESALE. SALE UNDER DECREE.**
- ### PRECEPT.
- When a company empowered by parliament has given notice to an owner of land to treat for the purchase of a part of it, but the owner and the company cannot agree upon the terms, and the company, therefore, issues a precept to the sheriff to summon a jury to assess the value, the part of the land which is described in the precept as being that of which the jury are to assess the value, must be neither less nor more than that for the purchase of which the owner has already been required by the notice to treat. *Stone v. Commercial Railway Company*, 122.
- ### PROBATE.
- A husband and wife, who were British subjects, and were domiciled and resident in England, but were jointly entitled to a sum of money secured upon mortgage of an estate in the Danish island of St. Croix, made a joint will according to the Danish law, bequeathing all their personal estate, and afterwards the husband made a sole will, bequeathing all his personal estate, and particularizing, amongst other things, money due on mortgage of an



estate in St. Croix, and the wife having survived him also made a sole will bequeathing all her personal estate. The two sole wills were proved in England, but the joint will was not. It appeared in evidence that for the purposes of transmission the Danish law considers money due upon mortgage of land as personal estate: Held, that the court could not take notice of the joint will, and that the mortgage money passed under each of the sole wills. *Price v. Dewhurst*, 76.

**PRODUCTION.**  
See PRACTICE, 14, 20.

**PROFITS.**  
See TRADE (PROFITS OF.)

**PUBLICATION.**  
See PRACTICE, 21.

**PURCHASE (COMPULSORY.)**  
See JURISDICTION, 2. PRECEPT.

**PURCHASER.**  
See CONVEYANCE. RESALE.

**RAILWAY ACTS.**  
See JURISDICTION, 2.

**REAL ESTATE.**  
See ALIENS.

**RECEIVER.**  
See PRACTICE, 20.

**RELATOR.**  
See PRACTICE, 13.

**RELEASE.**

Degree of weight to be attached to deeds of release executed by *cestui que trust* within a few days of their respectively coming of age, when such releases profess to proceed upon the examination of complicated accounts. *Wedderburn v. Wedderburn*, 41.

**RELIGIOUS FAITH.**  
See JURISDICTION, 4. EDUCATION.

**REMAINDERMAN.**

Whether a devisee in remainder of leaseholds, who is himself the executor of the testator, could, after having acquiesced for nearly thirty years in the tenant for life's receiving the rents, insist that, according to the terms of the will, the property ought to have been converted immediately after the testator's death, *quare*. *Pickering v. Pickering*, 289.

**RENTS.**  
See AFFORTIONMENT.

**REPAIRS.**  
See LUNATIC, 1.

**RESALE.**

An order for a resale, made in consequence of  
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the purchaser's default in completing his purchase, should not discharge him from his purchase. *Harding v. Harding*, 514.

**RESIDUARY LEGATEES.**  
See COURTS, 4.

**ROMAN CATHOLIC EDUCATION.**  
See JURISDICTION, 4.

**ST. CROIX.**

Nature and jurisdiction of an executor's court of dealing in St. Croix. *Price v. Dewhurst*, 76.  
See PROBATE.

**(SALE UNDER DECREE.)**  
See RESALE. CONVEYANCE.

**SALE (POWER OF.)**  
See 'TRUSTEES' RECEIPTS, DISCHARGES.

**SCOTLAND.**  
See SUIT IN SCOTLAND.

**SEPARATE USE.**

1. Discussion of the validity of a limitation to the separate use of a woman who is single when the instrument comes into operation. *Nedby v. Nedby*, 367.
2. If property be given or settled to the separate use of a woman unmarried when the settlement or gift takes effect, and she be prohibited against anticipating it, it will, if not alienated by her when discovered, be enjoyed by her as her separate estate, during any coverture or covertures to which she may afterwards be subject; and she will, during the existence of such coverture or covertures, be unable to anticipate it. *Tullett v. Armstrong*. *Scarborough v. Borman*, 377.
3. Personal chattels bequeathed to a single woman for her separate use, but without the intervention of any trustee, cannot be seized in execution by a judgment creditor of an after taken husband. *Newlands v. Paynter*, 408.

**SERVICE.**  
See PRACTICE, 15, 22, 23.

**SET OFF.**

- I., being indebted to his sister C., became a bankrupt: shortly afterwards C. made her will, and thereby gave certain sums to her trustees and executors as pecuniary provisions for the benefit of I. in a form apparently intended to exclude the claims of creditors. She never proved her debt against the bankrupt's estate, and died before he obtained his certificate. On a bill by the assignee against the executors of C. for payment of the money bequeathed for the use of the bankrupt, the Lord Chancellor held, affirming the decree of the Master of the Rolls, that the executors were not entitled to set off the amount of the unproved debt against the demand of the assignee. *Cherry v. Boulton*, 442.

**SETTLEMENT.**

*See* COVENANT TO SETTLE. MAINTENANCE. POWER, 2.

**SETTLEMENT (VOLUNTARY AND IMPERFECT.)**

A father, being seised of certain freehold property, and being possessed of certain East India stock, and shares in the Globe Insurance Company, by a deed poll, reciting that, with a view of making some provision for Mrs. C., one of his married daughters, and her husband and children, he had determined to convey, assign, and transfer the freehold property, stock, and shares in manner after stated, and that he was about to transfer the stock in order to effect his intention thereafter declared in respect of the same stock, proceeded to make known that, in consideration of natural love and affection, and of 10s., he released the freehold property to his daughter's husband (in whose favor he had executed a lease for a year,) to hold to him in fee, to the use of his (the settlor's) daughter for life, remainder to her husband for life, remainder to her children as tenants in common in fee. And he further made known that, for settling and assuring the stock and shares, and for effecting his intention in that behalf, and for the considerations before expressed, he thereby granted, bargained, sold, and assigned the stock and shares to his daughter, her executors, &c., with full power, in his name or otherwise, either personally or by attorney, to recover and receive such part of the premises as a mere assignment would not enable her to recover or receive: to hold to her, her executors, &c. for her separate use; and in case her husband should survive her, then with power for him to receive the dividends for his life, and after the death of the survivor of them, then for the benefit of their children equally. And by the same deed poll the settlor directed his real and personal representative to make and execute all acts, conveyances, transfers, or other assurances for more effectually conveying, transferring, or otherwise assuring the premises. This deed (as well as the lease for a year) was sealed and delivered by the intestate in the usual way, but he retained it in his possession until his death, which happened two months afterwards, and it was then found in a chest belonging to him, enclosed in an envelope, bearing an indorsement in his handwriting in the following words:—"Papers concerning Mr. and Mrs. C. and their children, in regard to there being no settlement made on them at the marriage. To be given up to Mrs. C. at my death, and immediately."

The existence of the deeds did not become known to the daughter, or her husband or children, till after the intestate's death.

The deed poll was not an effectual mode of transfer, either of the East India stock or of the Globe shares; but Mrs. C. after the intestate's death, having taken out administration to his estate, transferred the stock and shares into the names of her husband and herself.

A bill having been filed by one of the co-

heiresses and next of kin of the intestate, praying that the deeds might be declared void and delivered up, and praying a declaration that the stock and shares formed part of the intestate's personal estate, or, if the conveyance should be held good, then that the freehold property might be brought into hotchpot:

The court declined to decide the question of the validity of the deed as to the freehold property, or the question of hotchpot, as the former was a question at law, and the latter depended on the former, and, further, could be properly determined only in another suit, which was pending, for the administration of the intestate's estate: but the court

Held, as to the East India stock and the Globe shares, that the deed poll was inoperative; and it declared that the stock and shares formed part of the intestate's personal estate. *Dillon v. Coppin*, 647.

**SOLICITOR.**

*See* TAXATION OF COSTS. LIEN, 1, 2.

**SPECIFIC LEGACY.**

*See* LEGACY.

**SPECIFIC PERFORMANCE.**

1. Decree for the execution of a lease to the plaintiffs, according to the terms of an agreement entered into between the two defendants; it appearing that one of the defendants who resisted the decree and claimed the benefit of the agreement for himself, acted as agent of the plaintiffs in negotiating the lease from his co-defendant, so that his own intention was immaterial: and the court being satisfied, moreover, upon the evidence, that the real object and understanding of the contracting parties was an agreement for a lease for the benefit of the plaintiffs. *Taylor v. Salmon*, 134.
2. To a common bill for the specific performance of a contract of sale, the parties to the contract are the only proper parties. *Wood v. White*, 460.

**STATUTES, (CONSTRUCTION OF.)**

1. 6 Ann. c. 18. The court has no power to order a remainderman expectant upon the determination of an estate *pur auter vie* to pay to the tenant *pur auter vie* the expenses of producing the *cestui que vie* under the act. 6 Ann. c. 18. *In re Isaac*, 11.
2. 5 & 6 W. 4. c. 76.  
*See* JURISDICTION, 1.
3. 1 & 2 Vict. c. 110, s. 14. A judge of the Court of Chancery is not a judge of one of the Superior Courts at Westminster, within the meaning of the fourteenth section of the 1 & 2 Vict. c. 110. *Miles v. Presland*, 431.
4. 4 & 5 W. 4. c. 22.

*See* APPORTIONMENT.

**STATUTE OF LIMITATIONS.**

*See* LIMITATIONS (STATUTE OF.)

**STAY OF PROCEEDINGS.**

*See* SUIT IN SCOTLAND.

## STOCK, LEGACY OF.

See LEGACY.

## SUIT IN SCOTLAND.

Plaintiffs who had obtained in this court a decree for an account against three defendants, two of whom resided in Scotland, and all of whom had real property there, brought actions in Scotland against the same defendants for the same demand; and they obtained leave from this court to prosecute the Scotch actions so far as should be necessary for the purpose of obtaining such security as it is in the power of the Scotch Court to give for the amount which, upon taking the accounts directed by the decree, should ultimately be found due to the plaintiffs. *Wedderburn v. Wedderburn*, 585.

## SUPPLEMENTAL BILL (LEAVE TO FILE.)

See PRACTICE, 3.

## SURVIVOR AND SURVIVING.

See WILL (CONSTRUCTION OF,) 4.

## TAXATION OF COSTS.

If an order for taxation of costs is obtained of course in a case in which it ought to have been obtained upon special application, it will be discharged. *Harris v. Start*, 261.

## TENANT FOR LIFE.

See CONVERSION. LEASEHOLDS.

## TIMBER.

See TITHES.

## TITHES.

Trees of the growth of twenty years or upwards, sprung from the roots or stools of old trees formerly cut down, are within the exemption of the 45 Edw. 3, c. 3, and are not titheable. *Loxon v. Pryce*, 600.

## TITLE (CONCEALMENT OF.)

A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not, in equity, be permitted to assert his own title against a title created by that other, although he derives no benefit from the transaction. *Nicholson v. Hooper*, 179.

## TITLE (GOOD IN EQUITY.)

See ASSIGNMENT (EQUITABLE.)

## TRADE (PROFITS OF.)

Difficulties of enforcing in chancery a *cestui que trust's* right (however clear) to participate in profits of a trade carried on in part with the trust fund. *Wedderburn v. Wedderburn*, 41.  
See PARTNERS, 1 2.

## TRIAL AT LAW.

Where upon an interlocutory application, an issue has been directed to try a question of fact, upon which the title of the parties depends, and a verdict has been found in favor of one party, which the court, on a motion for a new trial, refuses to disturb, the other party may, notwithstanding, proceed with the cause, and go into evidence in support of his case in opposition to the finding of the jury: and, if, at the hearing, his evidence is sufficient to raise a reasonable doubt of the correctness of the verdict, the same question will be sent to another jury. But the inconveniences of this course are so great that the court will be strongly inclined, when it grants such an interlocutory issue, to require from both parties an undertaking to be bound by the result. *Ansdell v. Ansdell, Gompertz v. Ansdell*, 449.  
See INJUNCTION (SPECIAL.) PATENT RIGHT, 1, 2.

## TRUSTS.

Persons who had obtained possession of mortgage money, under color of being personal representatives constituted by a joint will of husband and wife, and beneficially interested in part under that will, and with the assistance of an executor's court of dealing in St. Croix, which appeared to have had, in fact, under the circumstances of the case, no jurisdiction, held to be trustees of the money for the personal representatives of the husband and wife, who claimed under their respective sole wills. *Price v. Dewhurst*, 76.

See TRUSTEES' RECEIPTS, DISCHARGES.

## TRUSTEE AND CESTUI QUE TRUST.

1. Between *cestui que trust* and trustee, no lapse of time will preclude the account from the commencement of the trust, in a case in which the relation of trustee and *cestui que trust* continues, the transactions between them are not closed, and the delay of the claim is attributable to the trustee not having given to his *cestui que trust* that information to which he was entitled, and accounted with him in such manner as he ought. *Wedderburn v. Wedderburn*, 41.
2. A testator bequeathed a sum of long annuities to trustees, upon trust for his daughter for life, for her separate use, and, after her death, upon trust for such persons as she should by will appoint. One of the trustees purchased of the daughter and her husband the absolute interest in the long annuities, and took an assignment to himself of the daughter's life interest in them, accompanied by what purported to be an execution, by the same instrument, of her testamentary power over the reversion, with a covenant by the daughter and her husband for quiet enjoyment, and for further assurance. It was alleged that the price paid was inadequate: Held that, independently of any question of inadequacy of price, the transaction could not stand; and, upon the daughter's offer, after her husband's death, to repay

the consideration money, with interest, the deed was set aside. *Scott v. Davis*, 87.

See CONSIGNEE. DEVISE. PAYMENT INTO COURT, 2. SEPARATE USE, 3.

### TRUSTEES' RECEIPTS, DISCHARGES.

1. A testamentary charge of real estates with the payment of debts generally, authorizes a trustee to whom, after imposing the charge, the testator has devised the estates upon trust for other persons, to sell or mortgage the estates charged, and exempts the purchaser or mortgagee from liability to see to the application of the purchase or mortgage money. *Ball v. Harris*, 264.
2. A testator devised his real estate, charged with the payment of his debts and legacies, to his eldest son, in fee, and appointed him executor. Nine years after the testator's death, the devisee, being then in possession, mortgaged the estate, and covenanted against all incumbrances except the legacies. In a suit subsequently instituted by one of the legatees for payment of his legacy, the estate was sold, and the proceeds proved insufficient to satisfy the testator's unpaid debts and legacies, together with the mortgage money. Held, that the mortgagee's title was complete, subject only to the amount of the legacies, and therefore, that after reserving the amount of the legacies, the mortgagee was entitled to the residue of the fund as a security for his debt, and that the amount so reserved was assets of the testator unadministered, and was therefore to be applied, first, in satisfaction of his debts, and then, so far as it would extend, in payment of his legacies. *Eland v. Eland*, 420.
3. The rule relieving a purchaser from seeing to the application of his purchase money, where there is a general charge of debts and legacies, has reference to the state of things at the death of the testator; and if the debts are afterwards paid, leaving the legacies charged that circumstance cannot vary the rule. *Ibid.*

### UNDUE INFLUENCE.

See AGREEMENT (SET ASIDE.)

### VENDOR AND PURCHASER.

See SPECIFIC PERFORMANCE, 2. CONVEYANCE. RESALE. SALE UNDER DECREE.

### VOLUNTARY SETTLEMENT.

See SETTLEMENT (VOLUNTARY AND IMPERFECT.)

### WILL (JOINT.)

See PROBATE.

### WILL (CONSTRUCTION OF.)

1. The wife of F. Shuttleworth was the only child of a person who was entitled to certain shares in the Nottingham canal, which, upon that person's death, were transferred into the names of "F. Shuttleworth and wife"—the wife having been her father's administratrix. F. S. was ever afterwards, until his death, treated by the canal company as proprietor of the shares, and received the dividends upon them, and was elected to be and acted as

a member of a committee which, by the company's act of parliament, was required to consist of proprietors of two or more shares. F. S., by his will, bequeathed what he called "all my shares in the Nottingham canal navigation," and all other his personal estate, to trustees, in trust for his wife for life; and after death, if he should leave no issue (which happened,) in trust to pay and apply the same equally between all and every his brothers and sisters, *their respective executors, administrators, and assigns, absolutely and for ever.* The testator had no canal shares at all unless those so transferred into the names of himself and his wife could be considered his. Two of his brothers and a sister, who were all living when he made his will, died in his lifetime.

Held, first, that the words of the will amounted to a bequest of the particular shares before mentioned, and that the widow was bound to elect.

Held, also, that the representatives of the brothers and sister who died in the testator's lifetime were not entitled to any share of his personal estate under his will, but that the whole vested in the brothers and sisters who survived him. *Shuttleworth v. Greaves*, 35

2. A testator gave his real and personal estate upon trust, after payment of his debts and funeral and testamentary expenses, and the costs and charges attending the execution of his will, to pay out of the annual produce, certain annuities to his three children for their lives, requesting that the surplus of the annual income might be applied in accumulation of the capital of his property for the benefit of his grandchildren; and that at the death of the survivor of his children, the trustees should convert all his property into money, and divide the same, after deducting the expenses of performing his will, among all his grandchildren living at his decease; and in case any of his grandchildren should die before their shares should become payable by virtue of his will, leaving issue, such issue should be entitled to the share which their parent would have been entitled to if then living; but in case of the death of any of his said grandchildren without leaving issue, and before becoming entitled to receive their respective shares, the testator then gave the shares of such deceased grandchildren equally among his surviving grandchildren, to be paid at the same time and in the same manner as before mentioned touching the original shares of his grandchildren.

The testator left his three children, and also ten grandchildren, surviving him. A suit was afterwards instituted for the administration of the estate, in which the annual income was paid into court and accumulated during the lives of the annuitants. At the death of the last surviving annuitant, which took place about thirty years after his death, only five of the grandchildren were living; but two of those who were dead had issue living, and the remaining three were dead without issue. It was held, that the issue of the two deceased grandchildren were entitled, not only to the original shares of their respective parents, but also to the interests which such parents, if living, would have taken in the shares of those

grandchildren who were dead without issue. *Eyre v. Marsden*, 231.

3. Where leasehold or other perishable property is included in a gift of all the testator's estate and effects to one person for life, with remainder over after his decease, the property is not to be converted into money at the testator's death, if the will contains indications of an intention that the tenant for life should enjoy the property in its existing state. *Pickering v. Pickering*, 289.

4. A testator, after disposing of certain property, gave to his wife, for her life only, all his remaining estates, and then proceeded in the following words:—"As also I leave, give, and bequeath to my said dear wife all my capital in trade, with the three quarters of the profits arising therefrom, for her life; but nevertheless in trust, at her death, for my then surviving children, share and share alike; independent of the rental of my said estates, which I give and bequeath to my surviving female children, to be paid to them as follows, by my executor J. C. W. or his heirs or assigns," &c.

The testator then, after directing his executor to pay such rents at certain particular times, proceeded thus:—"On the decease of any of the children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children, and from the last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them. But be it remembered, that my daughter Mrs. Eliza J. is exempt from any benefit arising from this will, the said Mrs. J. having had her share of my property at her marriage."

One of the daughters having survived the testator, married, and afterwards died, in the lifetime of his widow, leaving children. Held, that such children did not become entitled to their mother's share. *Wordsworth v. Wood*, 641.

See DEVISE, 1, 3. POWER, 2.









REPORTS  
OF  
CASES  
ARGUED AND DETERMINED  
IN THE  
HIGH COURT OF CHANCERY,  
DURING THE TIME OF  
LORD CHANCELLOR COTTENHAM.

---

BY R. D. CRAIG & T. J. PHILLIPS, ESQS.  
BARRISTERS AT LAW.

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WITH NOTES AND REFERENCES,  
TO BOTH ENGLISH AND AMERICAN DECISIONS;  
BY JOHN A. DUNLAP,  
COUNSELLOR AT LAW.

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**LORD LANGDALE, MASTER OF THE ROLLS.**

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**SIR LANCELOT SHADWELL, VICE-CHANCELLOR.**

---

**SIR JOHN CAMPBELL, ATTORNEY GENERAL.**

---

**SIR THOMAS WILDE, SOLICITOR GENERAL.**

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## **MEMORANDUM.**

During the sittings after Trinity term, 1841, RICHARD GODSON, Esquire, of Lincoln's Inn, WILLIAM WHATELEY, and MATTHEW TALBOT BAINES, Esquires, and the Honorable JAMES STUART WORTLEY, of the Inner Temple, and HENRY LONGLANDS, SUTTON SHARPE, CHARLES JAMES KNOWLES, CHARLES AUSTIN, and ALEXANDER JAMES EDMUND COCKBURN, Esquires, of the Middle Temple, were appointed counsel to Her Majesty.



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# REPORTS OF CASES

ARGUED AND DETERMINED IN

## THE HIGH COURT OF CHANCERY.

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*Between* THE ATTORNEY GENERAL, at the relation of the Mayor, Aldermen, and Burgesses of the Borough of LEEDS, in the County of YORK, Informant, and the said Mayor, Aldermen, and Burgesses, Plaintiffs; *and* JOHN WILSON, since deceased, WILLIAM BECKETT, JOHN BLAYDS, JOHN GOTT, THOMAS TENNANT, JOHN HEY, since deceased, GRIFFITH WRIGHT, HENRY HALL, CHRISTOPHER BECKETT, RICHARD BRAMLEY, THOMAS CHARLESWORTH, WILLIAM WILLIAMS BROWN, EDWARD COOKSON, JOHN HOLROYD, JAMES FAWCETT, GEORGE HIRST, BENJAMIN HALLEWELL, and RICHARD BASSETT WILSON, Defendants.

*By original and amended information and bill, and information and bill of revivor.*

1840: December 11, 12, 17.

A corporation may institute a suit for setting aside transactions fraudulent against it, although carried into effect in its name by members of the governing body; and that right is not affected by the Attorney General having also power to call in question such transactions.

The members of the governing body are the agents of a corporation; and if they exercise their functions for the purpose of injuring its interests and alienating its property, they are personally liable for any loss occasioned thereby.

Where a liability arises from the wrongful act of several parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party.

Certain members of the governing body of the corporation of Leeds, immediately after the passing of the municipal corporation act, procured funds belonging to the corporation to be applied by the trustees in whom they were vested, to purposes not warranted by the act. An information and bill, in which the corporation were the relators and plaintiffs, was filed for the purpose of making five individuals, out of the several members concerned in the transaction, and the trustees, personally liable to make good the funds. Held, that the suit was properly framed for that purpose; and a decree was made accordingly; and held that the other members concerned in the transaction were not necessary parties.

By letters patent of King Charles the Second, it was declared that the town and parish of Leeds should be a borough, and that the inhabitants of the town and \*parish, and their successors for ever thereafter, [\*2]

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should be incorporated by the name of mayor, aldermen, and burgesses of the borough of Leeds, in the county of York; and that a mayor, twelve aldermen, and twenty-four assistants should be chosen out of the inhabitants, in manner in the letters patent mentioned. The aldermen and assistants were to be called the common council of the borough, and were to aid, counsel, and assist the mayor in the well ruling and governing the borough, and in all disposals of lands, tenements, and profits to the same belonging, and in all matters and things appertaining or belonging thereto, for the better advantage, promotion, maintenance, and benefit of the borough: the mayor, aldermen, and assistants were to have the government of all the real and personal property of the corporation, and power to dispose thereof as they should deem most beneficial for the good rule and government of the borough; and they were to have power to make bye-laws, and to impose and levy fines in certain cases in the letters patent mentioned, to the use of the mayor, aldermen, and burgesses of the borough; and power to impose upon any persons refusing to take upon themselves the charge and execution of the offices of mayor, aldermen, or assistants when elected thereto, such fines as they should think reasonable to be levied to the use of the mayor, aldermen, and burgesses.

[\*3]     \*The revenue of the corporation arose principally from fines imposed under the authority of the letters patent, or under the bye-laws of the corporation; and on the 30th of May, 1835, its whole existing property had been derived from the accumulations of this revenue, and consisted of a sum of 6500*l.* consols, standing in the names of Edward Markland and the defendants Christopher Beckett and John Wilson, as trustees for the corporation, and also of a sum of 500*l.* secured on the tolls of the Leeds and Wakefield road, and of certain other property of very small amount.

On the 22d of May, 1835, notice was given in the House of Commons of the intention of the government to introduce a bill to provide for the regulation of municipal corporations in England and Wales: and on the 30th of May, a court of the mayor, aldermen, and assistants of the corporation was held, at which were present, besides other members, the defendant Wright, who was the mayor, the defendant Christopher Beckett, who was one of the aldermen, and was also the treasurer of the corporation, the defendants Hall and Bramley, who were two others of the aldermen, and the defendant Charlesworth, who was one of the assistants of the corporation; and at this court the following resolution was passed:—

“Resolved unanimously, that the sum of 6500*l.* three per cent. consols, and the sum of 500*l.*, secured on the tolls of the Leeds and Wakefield road, and the securities for the same, being the property of this corporation, be absolutely transferred and alienated to John Wilson, Esq., of Seacroft, William Beckett, Esq., of Leeds, and John Blayds, Esq., of Oulton, so as thereby to vest the same in those gentlemen, and divest this corporation of all power and control over the same.”



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\*On the same day in pursuance of this resolution, an indenture, ex- [\*4] pressed to be made between the mayor, aldermen, and burgesses of the borough of Leeds, of the one part, and John Wilson, William Beckett, and Blayds, of the other part, was executed under the common seal of the corporation, by which the 6500*l.* consols, and the 500*l.* secured on the road tolls, were expressed to be assigned to John Wilson, William Beckett, and Blayds, for their absolute use and benefit.

A deed poll of the same date and to the same effect was also executed under the common seal of the corporation.

No transfer of the consols in the books of the Bank of England was made until the 17th of July, as after stated.

On the 1st of June, Messrs. Nicholson and Barr, the solicitors of the corporation, wrote a letter to John Wilson, William Beckett, and Blayds, informing them that these sums had been assigned to them by the corporation.

On the 5th of June, leave was given, in the House of Commons, to bring in a bill to provide for the regulation of municipal corporations in England and Wales; and on the 12th of June, a court of the mayor, aldermen, and assistants was held, at which the following resolution was passed:—  
“Resolved, that this court views with alarm the sweeping measure of corporation reform, introduced into the House of Commons by Lord John Russell, as calculated to throw municipal government into the hands of political partisans and religious sectaries, opposed to the best and most sacred institutions of the country.”

\*In the middle of the month of June, Barr prepared and laid before [\*5] counsel, in the names of Nicholson and Barr, three cases for opinion, which were all expressed in the same words, and stated that the corporation of Leeds were then in possession of funds to a considerable amount, arising from various fines and sums of money imposed and levied on their own members and others elected to fill offices in the corporation who had declined to act therein, and from fees payable by each officer on his election to office, for the uses and purposes of the corporation; that the corporation had no other corporate property; and that they were about to take into consideration the propriety of applying the funds in their possession for such purposes as might appear to them desirable when duly convened to take the matter into consideration; and the opinion of counsel was sought whether or not the then present corporation of Leeds had full and absolute power to dispose of all their corporation funds raised in the manner before mentioned, without being in any respect subject to claims thereafter to be made by the then new intended corporate body or otherwise, and whether or not such appropriation could be better and more safely made before or after the passing of the municipal corporation bill into a law.

It appeared that Barr received his instructions for preparing the cases from Nicholson, who was the town clerk of the corporation, and who was in constant communication with the corporation as a body, and with its in-

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dividual members, on the subject of the cases, while they were in preparation; and that Barr had several communications with the defendants Wright, C. Beckett, and Hall on the same subject.

[\*6]     \*On the 4th of July the following memorial was addressed to John Wilson, William Beckett, and Blayds and was signed by the defendant Wright, the mayor, and nineteen members of the common council, including the defendants Hall, Christopher Beckett, Bramley, and Charlesworth.

*“ Leeds, 4th July, 1835.*

“ We whose names are hereunto subscribed, being severally members of the corporation of the borough of Leeds, do request that you will be pleased to appropriate the funds lately transferred to you by the corporation to the following purposes, at such times as you may think proper.

|                                                                                                     |                  |
|-----------------------------------------------------------------------------------------------------|------------------|
| To the Recorder, as a gratuity for his past services                                                | £525 money.      |
| To the Deputy Recorder                                                                              | 105 do.          |
| To the infirmary                                                                                    | 750 3 per cents. |
| To the house of recovery                                                                            | 500 do.          |
| To the public dispensary                                                                            | 250 do.          |
| Towards the subscription for the erection and endowment of a new church at the west end of the town | 1000 do.         |
| To improve the stipend of the officiating clergyman at St. Mary's                                   | 1000 do.         |
| To do. Christ's church                                                                              | 1000 do.”        |

In the middle of the month of July, a fourth case was, by the direction of the defendants Wright, C. Beckett, and Hall, submitted to counsel by Messrs. Nicholson and Barr, and was as follows:—

“ The corporation of the borough of Leeds, being possessed of the sum of 6500*l.* consols, and 500*l.* secured on mortgage of the tolls of the

[\*7] Leeds and Wakefield \*road met, on the 30th of May last, to determine on the best mode of disposing of the property, so as to prevent the same passing into the hands of the town council under the proposed municipal corporation reform bill, and adopted the following resolution.” [The case then stated the resolution, and the indenture and deed poll of the 30th of May, and proceeded.] “ The intention of the corporation certainly was, at the time of passing the above resolution, that their money should be applied to some public purposes; and had they not thought it necessary that immediate transfer and alienation should be made, they would, no doubt, have determined the specific purposes of appropriation, and the transfer would have been prepared accordingly; but, on the spur of the moment, it was thought that Messrs. Wilson & Co. might be safely intrusted with the absolute control over the property, and that they would attend to any suggestion the corporation might afterwards make to them on the subject of the disposition. The corporation have since addressed a memorial to Messrs. Wilson, Beckett, and Blayds, requesting them to appropriate the money as follows.” [Here.

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followed the objects of the appropriation as mentioned in the memorial.] “It has been since doubted whether the above resolution and assignments are sufficient to carry into full effect the intention of the corporation, especially since it has been ascertained that a clause has been introduced into the municipal corporation bill to prevent the alienation of corporate property, which will probably have a retrospective effect. You are therefore requested to advise on the legality and sufficiency of the measure already adopted by the new corporation: whether any thing further can now be done to prevent the property being subject to the provisions of the municipal reform bill; and should you advise any further deed or instrument to be executed by the \*corporation, or Messrs. Wilson, Beckett, and Blayds, you will [\*8] be pleased to state the nature and intended operation, and to prepare a draft of the same.”

On the 17th of July, and after the opinion of counsel on the last mentioned case had been obtained, Messrs. Glyn & Co., under a power of attorney from Markland, C. Beckett, and John Wilson, transferred the 6500*l.* consols into the names of John Wilson, William Beckett, and Blayds in the books of the Bank of England.

On the 9th of September, 1835, the municipal corporation reform act received the royal assent.

In the month of November, Messrs. Nicholson and Barr, having received final instructions from certain members of the corporation, but from whom in particular it did not appear, as to the trusts to be declared of the funds which had been transferred as before mentioned to Wilson, W. Beckett, and Blayds, prepared four indentures, all bearing date the 24th of November, 1835. By the first indenture, which was expressed to be made between John Wilson, William Beckett, and Blayds of the one part, and the mayor, aldermen, and burgesses of Leeds of the other part, and was executed by the parties of the first part, but was not executed under the common seal of the corporation, after reciting the indenture and deed poll of the 30th of May, 1835, and that the said several sums of 6500*l.* consols and 500*l.* were so assigned to Wilson, William Beckett, and Blayds, to the end that the same might be applied by them to certain public and corporate purposes, as was thereafter mentioned, it was witnessed that the parties of the one part did severally covenant with the parties of the other part, that they would stand possessed of the said several sums so assigned to them upon the trusts following, that \*is to [\*9] say, upon trust to raise and pay the sum of 525*l.* to the Recorder of the borough of Leeds for his absolute use and benefit; and the sum of 105*l.* to the Deputy Recorder of the said borough for his absolute use and benefit; and upon trust to transfer the sum of 750*l.* consols to the treasurer for the time being of the Leeds general infirmary; the sum of 500*l.* consols to the treasurer for the time being of the Leeds fever hospital; and the sum of 250*l.* consols to the treasurer for the time being of the Leeds public dispensary; and upon further trust to apply the dividends to arise from the sum of 1000*l.*

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consols for the benefit of the incumbent for the time being of St. Mary's Church, Leeds; and to apply the dividends to arise from the further sum of 1000*l.* consols for the benefit of the incumbent for the time being of Christ's Church, Leeds: and upon further trust to apply the further sum of 500*l.* consols for the purpose of building a gallery in the church at Woodhouse in the township of Leeds: and as to the residue of the trust moneys upon trust to pay and discharge all such debts, sums of money, engagements, expenses, dues, claims, and demands whatsoever which were then or should thereafter be due, owing, contracted, made or entered into, by, from, or with the mayor, aldermen, and burgesses, and also all other sums of money which might be ordered to be paid or applied by the mayor, aldermen, and burgesses, or by certain persons therein named (forming a committee appointed by the mayor, aldermen, and burgesses for the purpose of ascertaining and settling the amount of the sums of money so to be paid as aforesaid, and of ordering the payment thereof accordingly,) and, subject thereto, in trust for the mayor, aldermen, and burgesses, their successors and assigns.

By the second indenture, which was made between John Wilson, [\*10] William Beckett, and Blayds of the one \*part, and the defendants, Gott, Tennant, and Hey of the other part, and executed by all the parties thereto, after reciting the indenture and deed poll of the 30th of May, and that the sum of 2500*l.* consols, being part of the several sums of 6500*l.* consols and 500*l.* was so assigned to John Wilson, William Beckett, and Blayds to the intent that the same might be applied by them to and for the uses, intents, and purposes thereafter contained; it was witnessed that John Wilson, William Beckett, and Blayds, did assign to Gott, Tennant, and Hey the sum of 1000*l.* consols, upon and for such trusts, intents, and purposes, for the benefit of the incumbent for the time being of St. Mary's Church, Leeds, for the improvement of his stipend, as should be declared by a deed of even date therewith; and also the further sum of 1000*l.* consols, upon and for such trusts, intents, and purposes, for the benefit of the incumbent for the time being of Christ's Church, Leeds, as should be declared by a deed of even date therewith; and the sum of 500*l.* consols, upon trust to apply the same for the purpose of building a gallery in the church at Woodhouse.

By the two other indentures, which were made between, and executed by, the persons who were parties to the last mentioned indenture, trusts were declared of the two several sums of 1000*l.* and 1000*l.* consols for the benefit of the respective incumbents for the time being of St. Mary's Church and Christ's Church.

The committee alluded to in the first indenture of the 24th of November, was called "the account committee," and was appointed at a court of the mayor, aldermen, and assistants, held on the 29th of September, 1835.

[\*11] \*The sum of 2500*l.* consols, part of the 6500*l.* consols, had in fact been transferred on the 20th of November, by John Wilson, W. Beckett, and Blayds, into the names of the defendants, Gott, Tennant, and Hey.

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On the 27th of November, another court was held, at which the account committee and C. Beckett, the treasurer of the corporation, reported that John Wilson, W. Beckett, and Blayds, had executed the necessary deed (which was produced at the court) declaratory of the trusts on which they stood possessed of the sums of 6500*l.* consols, and 500*l.* sterling, in accordance with the intention of the corporation : and it was ordered that the several bills and accounts then produced should be allowed and paid ; and that all other debts and engagements of the corporation, and such other claims and demands as were provided for by the trust deeds, should be referred to the account committee, with power to them or a majority of them to audit and pass the same, and to make such order for payment and settlement thereof as to them might appear expedient, to the intent that all engagements and liabilities of the corporation up to the 31st day of December then next might be discharged.

At a court held on the 12th of December, letters were read which had been received by John Wilson, W. Beckett, and Blayds, from the Recorder and Deputy Recorder, declining to accept the sums of 500 guineas and 100 guineas respectively voted to them out of the corporation funds ; and it was ordered that certain sums of money, amounting in the whole to the sum of 138*l.*, should be paid by the treasurer out of the unapplied funds of the corporation in discharge of certain outstanding accounts, submitted to the meeting, incurred about the repairs of certain churches in Leeds ; and that \*certain sums of money, amounting, in the whole, [\*12] to the sum of 400*l.*, should be paid by the treasurer, out of the residue of the unapplied funds, to the respective treasurers of certain schools, for the uses and purposes of those schools ; and that the sum of 500*l.* should be applied by the treasurer out of the unapplied funds of the corporation, for the purpose of making a public street in a certain part of the town of Leeds.

Besides the 2500*l.* consols which were on the 20th of November, transferred into the names of Gott, Tenuant, and Hey, the further sum of 2000*l.* consols was sold out by Messrs. Glyn & Co., under a power of attorney from John Wilson, W. Beckett, and Blayds ; and in January, 1836, the further sum of 500*l.* consols was sold out by Messrs. Glyn & Co., under the same power. Part of the proceeds of the sale of the 2000*l.* and 500*l.* consols was applied in the manner pointed out by the resolutions passed at the before-mentioned courts. The several sums of 750*l.*, 500*l.*, and 250*l.* consols, which formed the residue of the 6500*l.* consols, remained standing in the names of John Wilson, W. Beckett, and Blayds, being the sums of which they had, in the first indenture of the 24th of November, been declared trustees for the respective treasurers of the infirmary, the fever hospital, and the public dispensary. The 500*l.* debt was never called in, but remained on the security of the road tolls.

The defendants Wright, Hall, C. Beckett, Bramley, and Charlesworth continued to hold their respective offices of mayor, aldermen, and assistant until

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the election of the mayor, aldermen, and councillors respectively, under the municipal corporation act. It appeared that the last mentioned defendants were present not only at the court held on the 30th of May, but also

[\*13] \*at all the before mentioned courts : and that, although various other members of the corporation were present at some of those courts, the last mentioned defendants alone attended at all.

The election of councillors and aldermen took place on the 26th and the 31st of December, 1835, respectively, and that of mayor on the 1st of January, 1836.

The council elected under the municipal corporation act, having resolved to institute proceedings for the recovery of the 6500*l*. consols and 500*l*. debt, the information and bill in this cause was filed on the 14th of June, 1836. The prayer, as amended, was, that it might be declared that the transfer and alienation of the 6500*l*. consols and 500*l*. sterling to John Wilson, W. Beckett, and Blayds was fraudulent and void, and that the same might be set aside ; and that it might be declared that the last-named defendants, and also Wright, Hall, C. Beckett, Bramley, and Charlesworth were respectively liable to make good the same sums, or so much thereof as should not have been duly and properly applied in payment of debts properly incurred by the corporation ; and that they might be respectively decreed to make good and pay the same to the plaintiffs or their treasurer ; and that John Wilson, William Beckett, Blayds, Gott, Tennant, and Hey might be declared to be trustees for the plaintiffs of the several sums of 750*l*., 500*l*., and 250*l*., 1000*l*., 1000*l*., and 500*l*. consols, respectively standing in their names, and might be decreed to transfer such sums to the plaintiffs ; and might, in the mean time, be respectively restrained from disposing thereof ; and that an account might be taken of such part of the sums of 6500*l*. consols and 500*l*. sterling as might have been properly and advantageously applied in payment of any debts of the corporation.

[\*14] \*The incumbents of the livings, and the treasurers of the infirmary, the fever hospital, and the public dispensary, were made parties defendants to the information and bill ; and John Wilson having died after putting in his answer, the suit was subsequently revived against his personal representative, the defendant, Richard B. Wilson.(a)

The cause now came on to be heard before the Lord Chancellor.

The *Attorney General*, Mr. Jacob, Mr. Wigram, and Mr. Walker, in support of the information and bill.

The deeds of the 30th of May were voluntary, and merely affected a change of trustees, so that the funds continued the property of the corporation ; and no act was subsequently done by that body amounting to an alienation of the funds ; for the common seal was not affixed either to the memorial of the

(a) A statement of the allegations of the information and bill will be found in the ninth volume of Mr. Simon's Reports, [p. 30,] where the case is reported on demurrer.



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4th of July or to the deeds of the 24th of November, and therefore those documents could not bind the corporation: *Carter v. Dean of Ely*,<sup>(a)</sup> *Wilmot v. Corporation of Coventry*.<sup>(b)</sup> The trustees, however, have taken an active part in the disposition of these funds, by executing the deeds of the 24th of November, and transferring the funds without any proper authority from the corporation; and even supposing they had such authority, still they knew that the corporate funds had been made subject to certain trusts by the municipal corporation reform act, and they were bound to have dealt therewith accordingly.

\*This case is therefore one in which an illegal attempt has been [\*15] made by certain members of the governing body to alienate corporate property; and for the consequences of such an attempt, they may be made personally liable, either in a suit by the corporation itself, whose agents they are, or in an information by the Attorney General, as representing the community of the town at large. The suit, therefore, is properly framed as an information and bill. Then, as to the present defendants, it is not necessary that all the members of the governing body who signed the memorial of the 4th of July, or who attended the meetings at which the funds were disposed of, should be made parties to the suit; for a distinction exists between the case of trustees who have misapplied money received by them, and that of persons who have committed wrongful acts. In the first case, there may be contribution between the parties, and, consequently, they must all be joined in a suit instituted for the purpose of making any of them liable; but where certain persons, members of the governing body of a corporation, have, as in the present case, attempted to strip the corporation of all its property, they are in the situation of wrong-doers, between whom there is no contribution but each individual is personally liable for all the consequences of the wrong committed.

The following cases were referred to: *The Attorney General v. Aspinall*,<sup>(c)</sup> *The Attorney General v. Brown*,<sup>(d)</sup> *Dummer v. The Corporation of Chippenham*,<sup>(e)</sup> *The Charitable Corporation v. Sutton*,<sup>(g)</sup> and *The Mayor and Commonalty of Colchester v. Lowten*.<sup>(h)</sup>

\*Sir C. Wetherell, Mr. Bethell, and Mr. R. Atkinson, for the three [\*16] first mentioned trustees and the five members of the corporation.

The funds in question were not subject to the provisions of the municipal corporation reform act: they arose from fines imposed by the corporation upon such of its members as refused to take upon themselves the offices of mayor, aldermen, or assistants, or from fees paid by persons admitted to fill those offices; and the members of the corporation might at any time have divided those funds among themselves for their individual benefit.

It is said, that inasmuch as the common seal was not affixed to the deeds

(a) 7 Sim. 211.

(b) 1 Young & Coll. 518.

(c) 2 Mylne & Craig, 613.

(d) 1 Swanston, 265.

(e) 14 Ves. 245.

(g) 2 Atkyns, 400.

(h) 1 V. & B. 226.

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of November, 1835, the corporation never gave its sanction to the appropriation which has taken place; but the rule that a corporation can be bound only under its common seal does not extend to the disposition of chattels, which may be effectually made by resolutions passed at meetings of the corporate body: and in the present case, part of the funds, which had been assigned to the trustees by the deeds of the 30th of May, was disposed of under the authority of resolutions passed at meetings of the corporation duly convened. It is true the memorial of the 4th of July was not executed under the common seal, but it was signed by a majority of the members of the governing body of the corporation; and no reasonable doubt can exist that all that took place was approved of by the corporation, and was carried into effect so as to bind that body.

All that the corporation was bound to do was to provide for the discharge of the existing liabilities to which the borough fund was made subject by the municipal corporation act, and that they have done: the other [\*17] \*purposes to which that fund was made applicable by the same act, such as printing burgess lists, &c., were future and contingent, and the corporation was not bound to reserve any portion of the surplus to meet those purposes, but was justified in making an immediate application of the whole surplus for the public benefit of the inhabitants, when there were no specific trusts unsatisfied.

It is said, however, that both the corporation and the community of the town at large are aggrieved by what has been done. If that be so, they have not chosen their proper remedy. For if the corporation had sustained a wrong, it ought to have adopted the remedy given by the ninety- [\*18] seventh section of the act. (a) \*Your lordship, in *The Attorney*

(a) The 97th section is as follows:—

“And be it enacted, that it shall be lawful for the council first to be elected in any borough under the provisions of this act to call in question all purchases, sales, leases, and demises not made in pursuance of some such *bona fide* covenant, contract, agreement, or resolution made or entered into as aforesaid before the 5th day of June, and all contracts for the purchase, sale, lease, or demise of any lands, tenements, and hereditaments, and all divisions and appropriation of the moneys, goods, and valuable securities, or any part of the real or personal estate, of which on or before the 5th day of June in this present year, the body corporate of which they are the council, whether in their own right or as trustees for charitable or other purposes, was seized or possessed, which shall have been made or contracted between the said 5th day of June and the day of the declaration of their election; and for that purpose, if it shall appear to the said council that there is ground for believing that any such purchase, sale, lease, or demise, or such contract, or such division or appropriation of the premises, was collusively made for no consideration, or for an adequate consideration, it shall be lawful for the council of such borough, at any time within six calendar months next after the first election of councillors under this act shall have been declared in such borough, upon notice of their intention being first given in the London Gazette, and also affixed on the outer door of the town hall, or in some public place within the borough, to cause the value of the lands, tenements, hereditaments, and premises in question to be inquired of and found by a jury of twelve indifferent men of the county in which, or adjoining to which, in the case of Berwick upon Tweed, and of all counties of cities, and towns corporate, such lands, tenements, hereditaments, or premises do lie; and in order thereto the said coun-

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*General v. Aspinall*, (a) observed that the identity of the corporation continuing notwithstanding the alterations effected by the act, any \*attempt on the part of the new council to call in question acts rela- [\*19]

oil is empowered to summon and call before such jury all persons having the custody and possession of any deed or agreement concerning the said lands, tenements, hereditaments, and premises made or entered into since the said 5th day of June, and to cause all such deeds and agreements to be produced before the said jury, and examined by them; and to examine upon oath every person who shall be thought necessary to be examined (which oath the mayor is hereby empowered to administer;) and the council shall, by ordering a view or otherwise, use all lawful means for the information as well of themselves as of the said jury in the premises; and the said jury shall find the value of the said lands, tenements, hereditaments, and premises, and the consideration which shall have been given and also that which ought of right to have been given, for the purchase, sale, lease, demise, or appropriation thereof, according to the terms of such purchase, sale, lease, demise, contract or appropriation, and taking into account all the circumstances under which the same shall have taken place; and if the jury by their oaths shall find that no consideration, or a consideration less than that which they shall have so found to be the value which ought therefor to have been given, shall have been collusively given or contracted to be given by the terms of any such purchase, sale, lease, demise, contract, or appropriation; the party to such purchase, sale, lease, demise, contract or appropriation shall have his option either to reconvey and restore the lands, tenements, hereditaments, and premises in question, and to abandon the contract to which he shall have been party, upon receipt in each case, of the consideration, if any, which he shall have given for the same, or to give therefor in each case such additional consideration, so that the whole consideration given shall be that which ought of right to have been given, so found by the jury as aforesaid; and in every such case as last aforesaid, the additional consideration given or to be given shall be indorsed on the original deed or conveyance; and unless he shall so do within one calendar month next after the finding of the jury, every such purchase, sale, lease, demise, contract, and conveyance shall be absolutely void and of none effect as against the said body corporate and their successors; and in every case in which any such contract shall have been abandoned as aforesaid, or in which any such purchase, sale, lease, demise, contract, or conveyance shall become void and of none effect under the provisions of this act, the party who would otherwise have had the benefit of the same shall be remitted to his former estate, title, and interest, if any, in the premises, as if no such contract, purchase, sale, lease or demise had been made or entered into; and for summoning and returning such juries, and for imposing fines on the sheriff, his deputy, bailiff, or agent, and on the persons summoned and returned on the said jury, and on any person required to give evidence, who shall in this behalf contravene the provisions of this act, the council of every such borough shall have all the powers given in that behalf to the trustees or commissioners of any turnpike road, by an act made in the third year of his late Majesty George the Third, intituled 'An act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England;' and all the costs of the said jury, and of all witnesses tendered by the said council to be examined before the said jury, shall in every case be borne by the council and paid out of the borough fund: provided nevertheless, that it shall be lawful for his majesty, if he shall think fit, by the advice of his privy council, upon petition to him setting forth the special circumstances under which any purchase, sale, lease, demise, contract, or appropriation of any of the said lands, tenements, hereditaments, and premises shall have been made since the said 5th day of June, to order that the same shall not be called in question; and in such case as last aforesaid the same shall not be called in question or set aside, or affected under the provisions of this act.

"Provided always, that in every case in which such petition shall have been presented, it shall be lawful for his majesty, if he shall think fit, to enlarge the time within which (in case his majesty shall not think fit to make such order as aforesaid) the council may have power as aforesaid to call in question any purchase, sale, lease, demise, contract, or appropriation referred to in such petition."

(a) 2 Mylne & Craig, 621.

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tive to the corporate property would be an attempt of the corporation [\*20] to impeach its own acts, \*which was a ground for conferring upon the council a distinct legislative authority for that purpose. The present proceeding, however, is not warranted by that section, and therefore no relief can be given upon it. If, on the other hand, the community of the town at large had reason to complain, the proper course was to file an information in the name of the Attorney General. At all events the corporation ought not to have been joined as plaintiffs in this suit, in which, as it is at present framed, the corporation seeks relief against its own acts, and attempts to make its trustees liable for what they have done by the direction of the corporation, their *cestui que trust*.

But whether the form of the proceeding were an information or bill, or both, it would be impossible that the trustees and the five members of the governing body, who are made defendants, could be held liable in respect of acts done by the direction of the corporation. The case of *Harman v. Tappenden*,(a) is an authority to show that persons acting in a corporate capacity are not personally liable. Besides, it is unjust to attempt to fasten this liability upon five individuals out of a large number, forming a majority of the members of the governing body, who acquiesced in the transaction, as is shown by their signatures to the memorial. If the object is to obtain relief not against the old corporation, because that still exists at law, but against the individual members of the corporation, they ought all to be made par- [\*21] ties to the suit. No case can be found which can \*justify the course which has been pursued. In *The Attorney General v. Brown*,(b) all the commissioners who had acted at all were made defendants.

Mr. *Loftus Wigram* and Mr. *Roundell Palmer* appeared for other parties.

The *Attorney General*, in reply.—No authority has been cited to show that these funds were the property of the individual members of the corporation: and in fact they arose from fines which are directed by the charter to be paid to the use of the mayor, aldermen, and burghesses as a corporation; there is no pretence for saying there are different kinds of corporate property; and the charter impresses all corporate property with a trust for the good rule and government of the borough.

The case of *Harman v. Tappenden*,(c) only shows that individual members of a corporation cannot be made liable for an act erroneously done by them in their corporate capacity without proof of malice, but it is there admitted that, if malice is proved, an action on the case will lie.

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*Dec. 17.*—THE LORD CHANCELLOR:—There can be no question but that the attempts to alienate the property of the corporation were ineffectual, and that so much of it as is now forthcoming must be restored, and compensation made for so much as is not forthcoming. That the 6500*l.* three per cents, and the 500*l.* due upon the turnpike bonds, were the property

(a) 1 East, 555.

(b) 1 Swanston, 265.

(c) 1 East, 555.

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\*of the corporation, is beyond all question ; and the defendants in this [\*22] cause cannot dispute it, because they have so treated it. The deed of the 30th of May, 1835, did not affect the character of the fund, being an assignment without consideration, and for a particular purpose, other than that of giving the property to the three trustees ; and as that particular purpose was never carried into effect, the trust would continue for the benefit of the assignors, that is, for the corporation.

So the matter stood on the 9th of September, 1835, when the municipal corporation reform bill received the royal assent. From that moment, whatever property belonged to the corporation became affected with the trusts declared by that act, and all attempts at alienation for purposes inconsistent with the objects of that act were illegal and void. This was the ground of my decision in *The Attorney General v. Aspinall* ; (a) and I have not since heard any good reason suggested for altering the opinion upon which I then acted. It follows that the alienations subsequently attempted of the property in question being obviously, and, indeed, professedly, for the purpose of defeating the purposes of the act, were illegal and void. There is no distinction to be made, for the purpose of recalling the property, between that part which remains in the hands of the three trustees and those parts which have passed to the hands of the different defendants. The attempts to bestow the property upon them were by means of deeds, which recited the deed of the 30th of May ; and all were made after the passing of the act : all the parties, therefore, had, or must be assumed to have had, notice of the illegality of the attempted transfers ; and all were voluntary, and without consideration. I consider it therefore \*as a matter quite of course to decree the [\*23] restoration to the plaintiffs, for the purposes of the act, of all the property now forthcoming in the hands of any of the defendants.

But it was said that such relief cannot be given in a suit in which the corporation are plaintiffs, because the acts complained of were acts of the corporation, and a *cestui que trust* cannot complain of a breach of trust to which he was a party. This objection was ingeniously argued, but it has no foundation to support it. What the present plaintiffs, the corporation, complain of, is, that certain persons, members of the corporation at a former time, fraudulently and illegally used the power and authority of the corporation for the purpose of depriving it of property to which it was by law entitled. Is it to be said that the corporation is therefore without remedy ? It is true that, in future, all such property being in trust for the benefit of the public, the Attorney General may assert the right of the public in an information ; but if, before the act passed, a corporation might, in a proper case, institute a suit for the purpose of setting aside transactions fraudulent against it, though carried into effect in the name of the corporation, that right cannot be affected by the Attorney General having also a power to complain of the transaction. In the great majority of suits instituted in this court, for the purpose of re-

(a) 2 Myl. & Craig, 613.



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scinding transactions, it is the act of the plaintiff himself which he seeks to rescind ; he says, " The act was mine, but it arose from the fraud or other misconduct of those who then had the management of my affairs." Why may not a corporation, upon the same ground, have the same relief ? Why are they alone to be denied the exercise of this the most important jurisdiction of this court ? Certainly not because their affairs do not require [\*24] it. The true way \*of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property ; and if such agents exercise those functions for the purposes of injuring its interests and alienating its property, shall the corporation be estopped in this court from complaining because the act done was ostensibly an act of the corporation ?

Not to go further into the authorities (for it is quite unnecessary to do so) than the cases cited for other purposes, it will be found that Lord Hardwicke, in the case of *The Charitable Corporation*, (a) and Lord Eldon, in the case of *The Corporation of Colchester*, (b) do not seem to have felt any difficulty upon this subject. I am, therefore, of opinion that any relief which the circumstances call for may be properly administered in this suit. I am of opinion that this is the principle to be acted upon, independently of the provisions of the 97th section ; and it is to be observed that that section had an object which does not apply to the present case. That object was to enable the corporation to call in question acts which might have been done before the passing of the act, and after the 5th of June ; and which, therefore, might be strictly legal in themselves ; whereas, in this case, the acts called in question were after the passing of the act, and therefore, from the beginning, illegal ; the deeds of the 30th of May, though intended for a bad purpose, being inoperative. I am the more induced to make this distinction, because some observations of mine in *The Attorney General v. Aspinall* (c) were referred to, as supporting the argument \*that the corporation in this case [\*25] could not be heard to impeach its own acts ; whereas those observations were, in terms, in that passage, confined to acts between the 5th of June, and the passing of the act, and therefore have no application whatever to the present case.

Connected with this objection was another, which was the subject of the main argument in this cause, namely, the liability of the five corporators ; I say, connected with the objection I have been considering, because it proceeds upon a similar supposition, that the whole was the transaction of the corporation, and therefore that the corporation, on the one hand, cannot complain of it, and on the other cannot call in question the act of any member of the corporation for the part he took in the corporate act. I think both objections

(a) *The Charitable Corporation v. Sutton*, 2 Atkyns, 400.

(b) *The Mayor and Commonalty of Colchester v. Lowfen*, 1 V. & B. 226.

(c) 2 Mylne & Craig, 621.



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are founded upon the same error ; namely, that of confounding the legitimate acts of the corporation with unauthorized acts effected by members or agents of the corporation in the name of the corporation. Of these the corporation may complain, and may have redress against such members or agents as are the authors of the wrong. No doubt could be entertained of the right of a corporation to redress against its agents. Can it be that no redress can be had against the author of the wrong because he was a member of the corporation, and effected it by an abuse of the power which that situation gave him ? In the Charitable Corporation case,<sup>(a)</sup> Lord Hardwicke draws the distinction between the acts for which a member of a corporation would be liable, and those for which he would not. He says, " Committee men are most properly agents to those who employ them in the trust, and who empower them to direct and superintend the affairs of the corporation. In this respect they \*may be guilty of acts of commission and omis- [\*26] sion, of malfeasance and nonfeasance ; but where acts are executed within their authority, as repealing bye-laws, and making orders, in such cases, though attended with bad consequences, it will be very difficult to determine that those are breaches of trust ; for it is by no means just in a judge after bad consequences have arisen from such executions of their power, to say that they foresaw at the time what must necessarily happen, and therefore were guilty of a breach of trust." Lord Hardwicke then proceeded to consider the evidence of misconduct imputed to the committee men. I have a similar duty in this case with respect to the five members of the governing body ; in doing which I shall say no more of the case proved against them than is necessary for the purpose of explaining the grounds of my decrees.

As members of the governing body, it was their duty to the corporation, whose trustees and agents they, in that respect, were, to preserve and protect the property confided to them ; instead of which, having previously, as they supposed, placed the property, by the deeds of the 30th of May, 1835, in a convenient position for that purpose, they take measures for alienating that property, with the avowed design of depriving the corporation of it ; and, with this view, they procure trusts to be declared, and transfers of part of the property to be made to the several other defendants in this cause, for purposes in no manner connected with the purposes to which the funds were devoted, and for which it was their duty to protect and preserve them. This was not only a breach of trust and a violation of duty towards the corporation, whose agents and trustees they were, but an act of spoliation against all the inhabitants of Leeds liable to the borough rate ; every individual of whom had an interest in the fund, for his exoneration, \**pro tanto*, from the bor- [\*27] ough rate. If any other agent or trustee had so dealt with property over which the owner had given him control, can there be any doubt but

(a) 2 Atk. 405.

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that such agent or trustee would, in this court, be made responsible for so much of the alienated property as could not be recovered in specie?

But if Lord Hardwicke was right in the Charitable Corporation case, and I am right in this case, in considering the authors of the wrong as agents or trustees of the corporation, then the two cases are identical. I cannot doubt, therefore, that the plaintiffs are entitled to redress against the three trustees and those members of the governing body who were instrumental in carrying into effect the acts complained of; and it is proved that the five defendants fall under that description.[1]

The deed of the 30th of May, 1835, was avowedly made for the purpose of stripping the corporation of all its property before the bill then in parliament could pass. I have already said that it had not that effect; but can these defendants avail themselves of the failure of their scheme, and say that this was an innocent act, when they, with others, by the memorial presented to the trustees, assumed to themselves as individuals the right to interfere in the misapplication of those funds. They seem to have supposed that the trustees held the funds subject to the direction of the individual members of the governing body, upon the assumption that the title of the corporation had been effectually terminated. These five defendants, being agents and trustees of the corporation funds, though the legal title was not vested in them, by an illegal exercise of the authority of the corporation, procure the funds to be diverted from their legal custody and purpose, and to be placed [\*28] in other hands, and applied to other purposes. Of their liability to make good any deficiency in the funds arising from such conduct I entertain no doubt: Lord Hardwicke thought so a century ago, and certainly the jurisdiction of this court in such cases has been extended rather than restricted since that time.

It was then urged that, if that be so, all the governing body, at least all who took any part in these transactions, ought to be co-defendants. Upon this point, also, Lord Hardwicke's authority in the Charitable Corporation case,(a) is of the highest value. It was urged that, as the injury had arisen from the misconduct of many, each ought to be answerable for so much only as his particular misconduct had occasioned; but Lord Hardwicke said, "If this doctrine should prevail, it is indeed laying the axe to the root of the tree. But if, upon inquiry, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all guilty; nor will I ever determine that a court of equity can-

(a) *The Charitable Corporation v. Sutton*, 2 Atkyns, 400; see p. 406.

[1] That all persons implicated in a breach of trust, fraud, or other illegal act, may properly be made parties, although having no interest in the subject, and the object being merely to charge them with the costs of the proceeding; see *Graham v. Coape*, 3 Myl. & Cr. 643; *Booth v. Booth*, 1 Beav. 125; *Beasley v. Kenyon*, 3 Beav. 544; *Fyler v. Fyler*, id. 550; *Perry v. Knott*, 4 Beav. 179; *Beadles v. Burch*, 10 Sim. 332; *Consett v. Bell*, 1 Yo. & Coll. C. C. 569; *Bowman v. Raine-  
taux*, 1 Hoff Ch. Rep. 150; *Hutchinson v. Reed*, id. 317.

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not lay hold of every breach of trust, let the person guilty of it be either in a private or public capacity." In cases of this kind, where the liability arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party.[2] It is, therefore, not necessary to make all parties who may more or less have joined in the act complained of; nor would any one derive any advantage from their being all made defendants, because, as the decree would be general against all found to be guilty of the charge, it might be executed against any of them. It is evident that Lord Hardwicke, in the case of *The Charitable Corporation*, \*considered that each defendant would be liable for each transaction [\*29] in which he had been a party. In the *Attorney General v. Brown*,(a) Lord Eldon overruled a demurrer for want of parties. He did not state his reasons; but it appears that the charge against the commissioners was for misconduct, and one object of the suit was to regulate their future conduct, and some of them only who had acted in the matter complained of were parties. In this case other names appear to the resolutions and to the memorial, but there is no proof before me that the conduct of any other member of the corporation was such as to subject him to the responsibility which I think attaches to these five defendants; and if that had appeared, it would not have afforded them any protection. I am, therefore, of opinion that they cannot support the objection that others are not made co-defendants.

It only remains to consider the form of the decree. It must declare that the 6500*l.*, three per cents, and 500*l.*, notwithstanding the deeds of the 30th of May, 1835, continued and was the property of the corporation of Leeds at the time of passing the act, entitled "An act to provide for the regulation of municipal corporations in England and Wales," and was, therefore, from that time, subject to the trusts and purposes prescribed by that act; and that the subsequent alienations of such stock and funds for any other purposes, and particularly the deeds of the 30th of May and the 24th of November, 1835, were breaches of trust, and fraudulent and void; and that the three trustees and the five members of the corporation are liable to make good any loss which may arise therefrom. Then direct the several defendants to re-transfer the several sums transferred to \*them, and refer it to the master to inquire [\*30] what parts of such stocks and funds, other than such as have been so transferred to others of the defendants, and therefore capable of being re-transferred, have been sold or disposed of, and when, and by whom, and by whose direction or authority, and in what manner the same and the proceeds

(a) 1 Swan. 265.

[2] As to the general rule that there can be no contribution between wrong-doers, see further *Merryweather v. Nixan*, 8 Term Rep. 186; *Peck v. Ellis*, 2 Johns. Ch. Rep. 131; *Belts v. Gibbins*, 2 Ad. & Ell. 57; S. C. 4 Nev. & Mann. 77; *Coventry v. Barton*, 17 Johns. Rep. 143; *Arnold v. Clifford*, 2 Sumn. 239; *Dupuy v. John*, 1 Bibb, (Ky.) Rep. 562; Pal. Pr. & Ag. (ed. by Dunl.) 152, and notes, *ibid.*

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thereof, and each and every part thereof, have been paid, applied, and disposed of; with liberty to state special circumstances: the costs of the suit to the hearing to be paid by the three trustees and the five members of the corporation.[3]

[3] Two of the proprietors of shares in a company called the "Victoria Park Company" incorporated by act of parliament filed a bill on behalf of themselves and all other proprietors of shares except the defendants, against the five directors, (three of whom had become bankrupt,) and against a proprietor who was not a director, and the solicitor and architect of the company, charging the defendants with concerting and effecting various fraudulent and illegal transactions, whereby the property of the company was misapplied, aliened and wasted; that there had ceased to be a sufficient number of qualified directors, to constitute a board; that the company had no clerk or office; that in such circumstances the proprietors had no power to take the property out of the hands of the defendants, or satisfy the liabilities, or wind up the affairs of the company; praying that the defendants might be decreed to make good to the company the losses and expenses occasioned by the acts complained of, and praying a receiver, &c. On demurrer it was held, under the facts stated in the bill, and with reference to the act of parliament by which the company was created, that there was nothing to prevent the company from obtaining redress in its corporate character in respect of the matters complained of; and that therefore the plaintiffs could not sue in a form of pleading which assumed the practical dissolution of the corporation. Wigram V. C. "The Victoria Park Company is an incorporated body, and the conduct with which the defendants are charged in this suit is an injury not to the plaintiffs exclusively; it is an injury to the whole corporation by individuals whom the corporation intrusted with powers to be exercised only for the good of the corporation. And from the case of the *Attorney General v. Wilson* (without going further) it may be stated as undoubted law, that a bill or information by a corporation will lie to be relieved of injuries which the corporation has suffered at the hands of persons standing in the situation of the directors upon this record. This bill however differs from that in the *Attorney General v. Wilson* in this,—that instead of the corporation being formally represented as plaintiffs, the bill in this case is brought by two individual corporators, professedly on behalf of themselves and all the other members of the corporation, except those who committed the injuries complained of,—the plaintiffs assuming to themselves the right and power in that manner to sue on behalf of, and represent the corporation itself. It was not, nor could it successfully be argued, that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law, the corporation and the aggregate members of the corporation, are not the same thing for purposes like this; and the only question can be, whether the facts alleged in this case, justify a departure from the rule which *prima facie* would require that the corporation should sue in its own name, and in its corporate character, or in the name of some one whom the law has appointed to be its representative." The case not being brought within the exception, the demurrers of the respective defendants were allowed. *Foss v. Harbottle*, 2 Hare, 461, 490.

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## \*IN RE BAINES.

[\*31]

1840: December 8, 9, 15.

Whether the stat. 53 G. 3, c. 127, s. 7, which gives power to justices to enforce the payment of a sum not exceeding 10*l.* due upon a church rate, where neither the validity of the rate nor the liability of the party has been questioned, takes away the jurisdiction of the Ecclesiastical Court in such cases, *quære*.

But, assuming that it does, it seems that it is still competent to institute a suit in that court for payment of a sum under 10*l.* due upon a church rate, because, until the defendant has appeared in such a suit, there may be no means of knowing whether the validity or liability is in dispute or not. Therefore, where a *significavit*, as recited in the return to a writ of *habeas corpus*, stated that the prisoner had been pronounced guilty of contumacy, for non-payment of a sum of 2*l.* 5*s.* to certain churchwardens, with their costs of suit, pursuant to a monition duly issued in a certain cause of subtraction of church rate, the proceedings wherein were carried on in pain of the contumacy of the prisoner, who, though duly cited with the usual intimation, had not appeared, an objection, that the cause was not sufficiently described, for want of an averment that the validity of the rate or the liability of the party was in dispute, was overruled.

The object of the control which this court has over the Ecclesiastical Courts by means of the writ of *habeas corpus*, is to keep those courts within the jurisdiction which the law has assigned to them, and not to correct any error into which they may fall in the exercise of it. And, therefore, objections taken to a *significavit* upon the ground that it did not sufficiently show that the defendant had been regularly cited, and upon the further ground, that the Ecclesiastical Court was not, according to its own practice, authorized to proceed to judgment upon the merits, against a party who had never appeared, were overruled.

An objection, that the *significavit* appeared to be in the name of the official principal and not of the archbishop, overruled.

*Semble*: The memorandum upon a writ *de contumace capiendo* need not show that all the formalities prescribed by the act 5 Eliz. c. 23. have been complied with.

THIS was a motion, made upon the return to a writ of *habeas corpus*, for the discharge of a prisoner, William Baines, who had been taken into custody under a writ *de contumace capiendo*, which had been issued upon the following *significavit*:—

“To Her Most Excellent Majesty, Victoria, &c., Herbert Jenner, knight, doctor of laws, official principal of the Arches Court of Canterbury, lawfully constituted, health in Him by whom kings and princes rule and govern: We hereby notify and signify unto your Majesty that one William Baines, of the Market Place, in the borough of Leicester, hatter and hosier, a \*parishioner and inhabitant of the parish of St. Martin, in the said bo- [\*32] rough of Leicester, in the county of Leicester, hath been duly pronounced guilty of manifest contumacy and contempt of the law and jurisdiction ecclesiastical, in not obeying the lawful commands to pay or cause to be paid to William Fox, the proctor of William Jolly and William Berridge, the churchwardens of the said parish of St. Martin, the sum of 2*l.* 5*s.* of lawful money of Great Britain, rated and assessed upon him, and the sum of 125*l.* 3*s.* of lawful money of Great Britain, being the amount of costs on their behalf, duly taxed and moderated, pursuant to a monition, duly issued under seal of the said Arches Court, and duly and personally served on him the



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said William Baines for that purpose, and duly returned into the said Arches Court, with a certificate and affidavit of the execution thereof, of us the said Herbert Jenner, knight, doctor of laws, official principal of the Arches Court of Canterbury aforesaid, lawfully authorized, by not paying or causing to be paid to the said William Fox, the proctor of the said William Jolly and William Berridge, the said sum of 2*l.* 5*s.* and 125*l.* 3*s.* of lawful money of Great Britain, pursuant to the said monition, on a day and hour now long past, in a certain cause or business of subtraction of church rate, depending before us the said Herbert Jenner, knight, official principal of the said Arches Court, in judgment, by virtue of letters of request from the worshipful Christopher Hodgson, master of arts, commissary of the Right Reverend Father in God, John, by Divine permission, Lord Bishop of Lincoln, in and for the archdeaconry of Leicester, lawfully constituted, between the said William Jolly and William Berridge, churchwardens of the said parish of St. Martin, in the borough of Leicester, in the county, archdeaconry, and commissaryship of Leicester, in the diocese of Lincoln and province of Canterbury, the [\*33] parties promoting the \*said cause or business, of the one part, and the said William Baines, of the Market Place, in the borough of Leicester aforesaid, hatter and hosier, a parishioner and inhabitant of the said parish of St. Martin, the party against whom the said cause or business was promoted, on the other part, and the proceedings wherein were carried on in pain of the contumacy of the said William Baines, duly cited to appear in the said cause or business, and also duly cited to see proceedings thereon, with the usual intimation, but in no wise appearing. We therefore humbly implore and entreat your said most excellent Majesty would vouchsafe to command the body of the said William Baines to be taken and imprisoned for such contumacy and contempt."

A writ *de contumace capiendo* was afterwards issued, which was addressed to the sheriff of Leicestershire, and, after reciting the *significavit* at full length, proceeded to command the sheriff to attach the said William Baines.

The memorandum on this writ did not state that it had been opened in the Court of Queen's Bench.

The return of the writ of *habeas corpus* stated that the prisoner was in custody under this writ *de contumace capiendo*, which it set forth.

Mr. M. D. Hill and Mr. Mellor, in support of the motion.

1. The *significavit* is bad in substance, on the following grounds.

i. The cause is not sufficiently described to show that the Ecclesiastical Court had jurisdiction in the \*matter; *Regina v. Hill*,<sup>(a)</sup> [\*34] *Rex v. Fowler*,<sup>(b)</sup> *Nash's case*,<sup>(c)</sup> *Deybel's case*,<sup>(d)</sup> *Souden's case*;<sup>(e)</sup> for although, in the time of Lord Raymond, it might be a sufficient description of a cause of this nature to entitle it a cause of subtraction of church rate,

(a) 1 Salk. 294.

(b) 1 Ld. Raym. 618; 1 Salk. 293; 12 Mod. 418.

(c) 4 B. & Ald. 295.

(d) 4 B. & Ald. 243.

(e) 4 B. & Ald. 294.



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*Rex v. Fowler*, (a) it is not so now; inasmuch as since the act 53 G. 3, c. 127, it is essential, in order to give the Ecclesiastical Courts jurisdiction, that either the amount of the rate should exceed 10*l.*, or the validity of the rate should be disputed. *Ricketts v. Bodenham*. (b) Now, it appears on the face of the *significavit* that the amount of the rate is under 10*l.*, and yet there is no allegation that the rate is disputed; and in fact Baines never appeared to dispute it; and it cannot be presumed that there have been any prior proceedings before magistrates, at which its validity has been disputed.

But even supposing the cause properly described, it is not stated with sufficient certainty that the sum rated and assessed upon the prisoner, and which he was called upon by the monition to pay, was the church rate in question in the cause: for anything that appears, the Ecclesiastical Court may have chosen to issue a monition in respect of an old church rate, or some other rate over which it had no jurisdiction, in which case the prisoner would be justified in refusing to pay the sum demanded of him.

ii. Some of the proceedings in the Ecclesiastical Court are stated with such a degree of uncertainty, that this court cannot see whether they have been regular; while "in others there has been manifest irregu- [\*35] larity. For instance, the *significavit* merely states that the prisoner was cited to appear with "the usual intimation," an expression, the meaning of which as used in the Ecclesiastical Courts, your lordship cannot judicially know, whereas the terms of the intimation ought to have been particularly set forth, in order that its sufficiency might be judged of; *Bruyeres v. Halcomb*, (c) *Ranson v. Dundas*. (d) In the case of *The King v. Maby*, (e) the *significavit* stated that the defendant had been condemned to perform "usual penance," without stating what penance, and the court held that it could not take notice of what the usual penance was. Then it appears that the Ecclesiastical Court has proceeded to judgment against the prisoner in his absence, a course which is contrary to natural justice, and to the whole spirit and practice of the English law; and there is no averment in the *significavit* that the Ecclesiastical Court has any such anomalous power or rule of proceeding. If it were incumbent on us to prove the contrary, the books of practice from the earliest times would abundantly show it. Clarke's Praxis, (g) Conset's Practice, (h) and Oughton's Ordo Judiciorum. (i) The Ecclesiastical Law Commissioners, in their report, (k) made in the year 1832, state that the mode of enforcing all process, in case of disobedience, is by pronouncing the party cited to be contumacious; and if the disobedience continues, a *significavit* issues, upon which an attachment from chancery is obtained to imprison the party till he obeys: that in cases where some act is required to be done by the party cited, as, for instance, to exhibit an "inventory and account, or to pay alimony, the compulsory process is [\*36]

(a) 1 *Ld. Raym.* 618. See p. 620.

(d) 3 *Bing. N. C.* 123.

(h) Page 35

(b) 4 *Adol. & Ellis*, 433.

(e) 3 *Dowl. & Ryl.* 570.

(i) *Tit.* 40, page 70.

(c) 3 *Adol. & Ellis*, 381.

(g) *Tit.* 20, page 24.

(k) Page 16.

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enforced; but in some cases, where no act is necessary to be done by the party cited, the plaintiff may proceed in *pœnam contumaciæ*, and the cause may go on *ex parte*, as if the defendant had appeared. An instance of the latter kind is referred to in Clarke's Praxis, as an exception to the general rule, namely where in a suit matrimonial, the husband is abroad or not to be found. But it is to be observed that, in the case of a suit matrimonial, the proceedings are *in rem*, for the purpose of affecting the validity of the marriage; whereas, in the present case, Baines was called upon to do an act, namely, to pay money: neither is this defect cured by the statement, that he was duly cited to see the proceedings, for the practice of citing parties to see proceedings applies only to third persons whose rights are incidentally involved in the question between the parties to the cause, as, for instance, a son tenant in remainder, where a suit is instituted between his father and mother, respecting the validity of their marriage.

2. The *significavit* is bad in point of form; for it ought to have been in the name of the Archbishop of Canterbury, and not in that of the official principal; The Year Book, 11 H. 4, 64, Brook's Abridgment, tit. Certificate of Bishop, Fitzherbert de Natura Brevium,<sup>(a)</sup> Trollop's case,<sup>(b)</sup> and Coke Littleton, 134 a, where the various authorities on this point are collected,

show that a *significavit* in the name of the official principal is bad at [\*37] common law.<sup>(c)</sup> This is according to the analogy of "the rule of law,

that delegated authority must be exercised in the name of the principal; as in the case of sheriff and under sheriff; Come's case.<sup>(d)</sup> The statute 53 G. 3, c. 127, made no change in this respect; and the schedule to that act shows clearly in whose name the *significavit* was to be; for the words there used, "by Divine Providence," are applicable only to an archbishop.<sup>(e)</sup>

3. The act 5 Eliz. c. 23, directs that the writ shall be brought into the Court of Queen's Bench, and there in the presence of the justices shall be

(a) P. 65.

(b) 8 Rep. 68. a.

(c) See Bacon's Abridgment, Excommunication, C.; Comyn's Digest, Excommengement, B.; Viner's Abridgment, Excommunication, B.

(d) 9 Rep. 76. b.

(e) The form of a *significavit* given in the schedule to the 53 G. 3, c. 127, is as follows: To his most excellent Majesty and our Sovereign Lord George the Third, by the grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, by Divine Providence, &c. Health in him by whom Kings and Princes rule and govern. We hereby notify and signify unto your Majesty that one of in the county of hath been duly pronounced guilty of manifest contumacy and contempt of the law and jurisdiction ecclesiastical, in not [as the case may be] appearing before [here set out the style of the ecclesiastical judge, or his representative,] or in not obeying the lawful commands [here set out the commands] of [such judge or representative] or in having committed a contempt in the face of the court of [such judge or representative,] lawfully authorized, by [here set out the nature and manner of such contempt,] on a day and hour now long past, in a certain cause of [here set out the nature of the cause, and the names of the parties to the same.] We therefore humbly implore and entreat your said most excellent Majesty would vouchsafe to command the body of the said to be taken and imprisoned for such contumacy and contempt.

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opened and delivered of record ; but in the memorandum endorsed on the writ, the word "opened" is omitted ; and it is said in the case of *The King v. Theed*,<sup>(a)</sup> that the provision that the writ must be first opened in the Court of King's Bench is a provision in favor of the liberty of the subject, that he may not be deprived of his liberty by writs that [\*38] issue of course out of chancery, until such time as the judges of the Court of King's Bench see whether he has deserved it or not. It is stated in Burn's Ecclesiastical Law,<sup>(b)</sup> that the form of taking out the writ, and the several steps mentioned in the act of Elizabeth ought to be strictly pursued ; and that in default thereof many persons have been discharged ; Gibson's Codex ;<sup>(c)</sup> *Anon.* ;<sup>(d)</sup> *Parker's case* ;<sup>(e)</sup> *Anon.*<sup>(g)</sup>

Mr. Wigram and Mr. Wightman, contra.

1. With respect to the description of the cause, it is sufficient if it appear to the court, upon the face of the proceedings, that the party was condemned in a suit respecting a subject matter apparently within the jurisdiction of the Ecclesiastical Courts, *The King v. Dugger*.<sup>(h)</sup> In *Nash's case*,<sup>(i)</sup> *Deybel's case*,<sup>(k)</sup> and *Souden's case*,<sup>(l)</sup> a special jurisdiction had been given to the court, by the express terms of acts of parliament, and it was necessary to bring the cases within the scope of those acts ; but not only was the return defective for the purpose of showing that the cases were within the acts, but it appeared positively that they were not. In a matter of subtraction of church rate, the Ecclesiastical Court has a general jurisdiction, which the act 53 G. 3, c. 127, does not take away, even in cases where the sum rated is under 10*l.* : in such cases it merely gives a jurisdiction to the magistrates under circumstances which make it necessary to aver affirmatively, that the validity of the rate has not been disputed in the ecclesiastical courts ; *Ricketts v. Bodenham*.<sup>(m)</sup> In the present case, it is sought to enforce the rate in the Ecclesiastical Court, and therefore its validity may possibly be there called in question.

As to the identity of the rate which Baines was monished to pay with that which was in question in the suit, it is enough to refer to the terms of the *significavit*.

To the objections which have been founded on the supposed irregularity of the proceedings in the Ecclesiastical Court, the answer is a general one that your lordship cannot, in this court and in this collateral proceeding, enter into the question whether or not the course of proceeding of the Ecclesiastical Court has been consistent with its usual practice, in a suit, too, where that court has an original jurisdiction. Suppose Baines were to proceed in the Ecclesiastical Court to set aside these proceedings, on the ground that they had been taken in his absence ; and suppose that, after the Ecclesiasti-

(a) 10 Mod. 351.

(d) Cro. Jac. 566.

(k) 5 Barn. & Ald. 791.

(l) 4 Barn. & Ald. 294.

(b) Vol. ii. 254.

(e) Cro. Car. 583.

(i) 4 Barn. & Ald. 295.

(m) 4 Adol. & Ellis, 433.

(c) Page, 1056.

(g) Ventris, 338.

(k) 4 Barn. & Ald. 243.

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cal Court had overruled the objection, and the Privy Council had affirmed that judgment upon appeal, this court should say the proceedings had been irregular, what an extraordinary conflict of jurisdictions would arise. Various authorities might be adduced to show that if the proceeding had been at common law, such an objection could not have been sustained. In *Doe v. Parmiter*,<sup>(a)</sup> it was held that a judgment shall be intended good till it be avoided; and that advantage of any error therein cannot be taken by pleading, but only by writ of false judgment; and in *Horsy v. Daniel*,<sup>(b)</sup> the same doctrine prevailed. In *Griffin v. Ellis*,<sup>(c)</sup> it was held that, even assuming a church rate to have been bad, as being retrospective, the party was not entitled to a writ of prohibition, as the suit itself was matter of ecclesiastical cognizance; and the proper course was to appeal. The same answer would have been given if it had appeared upon a *significavit* or a writ *de contumace capiendo* that the rate was bad. Still more is such an answer applicable where the objection, as here, is to a supposed irregularity in the form of procedure: for the practice of one court cannot be inquired into in another. *Dicas v. Lord Brougham*.<sup>(d)</sup> Of what use then would it have been in this case to state more particularly the terms of the intimation, when this court could not take notice of the practice of the Ecclesiastical Court, so as to decide upon the regularity of the intimation actually given? As to the objection that the suit has proceeded to judgment in the absence of the party, it would be entitled to no weight, in whatever form it were taken, where it is admitted that the party was duly cited to appear, and did not chose to do so. *Buchanan v. Rucker*,<sup>(e)</sup> *Becquet v. M'Carthy*.<sup>(g)</sup>

2. It is not essential to the validity of the *significavit* that it should be in the name of the archbishop; for it appears that the official principal might issue a *significavit* in cases of excommunication, reciting that the bishop was *in remotis*, and that recital could not be traversed; Fitzherbert de Nat.

Brev. (62); and, by custom, the archdeacon might issue a *significavit*; [<sup>\*41</sup>] Viner's Abridgment (title Excommunication, D. 5.) \*The authority of the official principal is such, that the bishop may sue before him in his own court; Burn's Ecclesiastical Law (title Chancellor); and he has the power to pronounce sentence of deprivation against a clergyman in his own name; *Burgoyne v. Free*,<sup>(h)</sup> *Oliver and Toll v. Hobart*,<sup>(i)</sup> and the cases there referred to. It cannot be disputed that he has power to issue a citation as he has done in the present case; and the stat. 53 G. 3, c. 127, directs that the judge who issued out the citation shall signify in cases of contumacy. With respect to the form contained in the schedule to that act, it is given merely as an exemplar.

3. As to the omission of the word "opened" in the indorsement on the

(a) 2 Levinz, 81.

(b) 2 Levinz, 161.

(c) 3 Perry &amp; Davison, 398.

(d) 6 Car. &amp; Payne, 249.

(e) 9 East, 192; 1 Camp. 63.

(g) 2 B. &amp; Adol. 951.

(h) 2 Haggard, 456; see p. 494.

(i) 1 Haggard, 47, note.

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writ, it is sufficient to say that the act of 5 Eliz. c. 23, does not require an indorsement, and, therefore, that if no memorandum at all had been indorsed on the writ, it would not be material. In the case of *The King v. Theed*,<sup>(a)</sup> the decision was upon other grounds; and the rule of law is, that "*præsumuntur omnia rite esse acta*."

Mr. Hill, in reply.

Dec. 15.—THE LORD CHANCELLOR:—When this case was first mentioned to me, I suggested that questions upon *significavit* from the Ecclesiastical Court had usually been made the subject of discussion here upon applications to discharge or quash \*the writ *de excommunicato* or *de* [\*42] *contumace capiendo*, when the writ not having been returned in the Queen's Bench, this court still had jurisdiction over it. The party has preferred, as he had an undoubted right to do, to rest his case upon the return to the *habeas corpus*, and my consideration is necessarily restricted, not to what has actually taken place in the Ecclesiastical Court—of which I know nothing, except from the *significavit* which that court has sent to me,—but to what is stated in that *significavit* to have there taken place.

It is important to keep in view the great difference between a court's assuming a jurisdiction which does not belong to it, and improperly exercising a jurisdiction with which it is legally invested. Upon this *habeas corpus* my duty is to protect the prisoner against the former, if it shall appear to have occurred. Another and a very different course would be to be pursued, if necessary, for the purpose of correcting the latter.

The first objection to the *significavit* was, that it did not show that the sum which the prisoner was ordered to pay was a church rate. I think that this is sufficiently stated, both with respect to the terms used, and to the form prescribed by the act. The *significavit* states the command to be to pay 2*l.* 5*s.*, rated and assessed upon him, pursuant to a monition duly issued under the seal of the Arches' Court, in a certain cause or business of subtraction of church rate. I am not now considering the amount of the church rate, but whether the *significavit* states the 2*l.* 5*s.* to have been rated and assessed for a church rate; and of this being stated with sufficient certainty, I have no doubt; nor does it appear how, consistently with the form prescribed in the \*schedule to the act, it could be more specifically stated; for, [\*43] by that form, the command is first to be stated, and then the cause in which it was made; but the command was probably merely to pay the sum in question, without repeating that it was for a church rate; that appearing from the proceedings; and if so, the form has been accurately followed.

Connected with this objection was another, that the amount of the rate appeared to be under 10*l.*, and that the Ecclesiastical Court had, by the 53 G. 3, c. 127, been deprived of its jurisdiction in church rates, unless the sum

(a) 10 Mod. 351.



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demanded exceeded that sum, or the validity of the rate, or the liability of the party was in dispute. To raise this objection it must be assumed that the jurisdiction is so taken away. Such the judges of the Court of Queen's Bench stated to be their opinion in *Rickett v. Bodenham* :<sup>(a)</sup> but that opinion did not regulate their judgment in that case; and had that opinion been different, the judgment must have been the same. It is not my wish to raise any doubt upon that point. In that case it was decided that a previous proceeding before magistrates is not necessary to give the Ecclesiastical Court jurisdiction in cases of church rate under 10*l.* if the validity or liability be in question. It would seem, therefore, that it must be competent to institute the suit, for without a suit, in such a case, there may be no means of showing that the validity or liability is in dispute; and if so, it does not seem very obvious how the suit can be objected to upon the ground that the validity or liability is not disputed, before the defendant appears. It was also

decided that in such a case, although the proceedings did show that [\*44] the validity or liability was in question, the party sued was not 'entitled to a prohibition; and it seems to have been the opinion of the judges, that, for that purpose, after sentence in the Arches' Court, unless want of jurisdiction appeared upon the proceedings, it would not be intended. I cannot, consistently with this doctrine, hold that the *significavit* does not state a suit of which the Ecclesiastical Court has jurisdiction. The cases of *Deybel*<sup>(b)</sup> and *Nash*,<sup>(c)</sup> have no application: in those 'cases there was no jurisdiction, except upon a particular fact which was not sufficiently stated. In this case there is a general jurisdiction, and the doubt is as to a particular fact, which, if it exists, may take it away.

Another objection much relied upon was, that the *significavit* states that the party prosecuted had never appeared, and that, without appearance, the court was not authorized to proceed to judgment upon the merits. In considering this objection, it must be assumed that the court had jurisdiction over the subject matter; and if so, the objection, if well founded, would amount only to this, namely, that it has improperly exercised its jurisdiction, and pronounced an illegal judgment. There may be very many grounds upon which a judgment may be illegal, and in one sense, the court, in pronouncing such judgment, exceeds its jurisdiction; but that is not the sense in which the expression is used, when applied to such a case as the present. The object of the jurisdiction I am now exercising is to keep the Ecclesiastical Courts within the jurisdiction which the law has assigned, and not to correct any error into which they may fall in the exercise of it. If this distinction be not carefully kept in view, every court and judge having authority to issue the *habeas corpus* would become a court of appeal from [\*45] the court by whose authority the 'party was committed, and so usurp the jurisdiction which the law has reposed in those courts to which

(a) 4 Adol. &amp; Ellis, 433.

(b) 4 B. &amp; Ald. 243.

(c) 4 B. &amp; Ald. 295.



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an appeal is given. In *Dr. Trebee's case*,<sup>(a)</sup> Lord Hardwicke very clearly marks the distinction, saying: "It is not necessary for the Ecclesiastical Court to show they have rightly proceeded." I do not say that a proceeding may not be so inconsistent with all principle as to justify the treating it as a nullity; but that cannot be said of this case, in which the course of proceeding has been one which has been made legal in other courts, and which is essential to the due administration of justice—I mean proceeding to judgment in cases in which the defendant, with full notice of the suit, and of its objects, does not choose to appear.

I was told, during the argument, and with perfect accuracy, that I could not judicially know any thing of the practice of the Ecclesiastical Court, and therefore that I could not know what was meant by the words "usual intimation;" and yet I was referred to several books of practice in the Ecclesiastical Court, for the purpose of proving that the court would not be justified in pronouncing any decree *in absentia*; but if that be so, it is not within my province to correct it in the present proceeding. If I were to commit a party for a contempt of this court, the Court of Queen's Bench would not, upon an *habeas corpus*, inquire into the propriety of my order, but simply whether it appeared upon the return that I had kept within my jurisdiction.

It was then argued that the term "usual intimation" was so uncertain as to make the *significavit* bad, upon the authority of a decision that the term "usual penance" had been held to be too uncertain. No doubt it would be so if it were essential for the court to know what the in- [\*46] timation was, as in the case referred, it must have been thought to be, to know, what had been the penance inflicted; but as part of the narrative of proceedings in a matter over which the court had jurisdiction, it is not, I think, material to know what the intimation was, as it would not be competent for me to exercise my judgment whether it was the usual intimation or not; besides which, it is twice stated that the party was duly cited; which expression is, indeed, as vague as the other, though it was not made the subject of observation. The terms are convertible, because the usual mode of citing was the due mode.

Another objection was that the *significavit* was in the name of Sir Herbert Jenner, the Dean of the Arches, and not in the name of the Archbishop of Canterbury. The act is imperative upon the judge to make the certificate; but it was said that he ought to make it in the name of the archbishop, not from any expression in the act itself (all such expressions tending to the conclusion that the whole duty of sending the *significavit* was reposed in the judge,) but because the form in the schedule is adapted to a *significavit* in the name of the archbishop. If the enacting part and the schedule cannot be made to correspond, the latter must yield to the former; and particularly in this case, in which the form given in the schedule cannot be made to apply

(a) 2 Atkyns, 498.

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to all or nearly all the cases which must arise; for a bishop could not send a *significavit* in that form. It must, therefore, be taken only as an example or precedent to be altered and adapted to each particular case. But what removed all doubt from my mind upon this subject was the information I have received from the officer that the Dean of the Arches has always sent the *significavits* in his own name.

[\*47] \*One other objection remains, which may be disposed of in very few words. The act of Elizabeth directs that the writ shall be brought into the Queen's Bench, and in the presence of the justices shall be opened, and delivered of record, &c.; but the memorandum only states that the writ was allowed, inrolled, delivered, and before our Lady the Queen at Westminster, according to the form of the statute in such case made and provided, omitting to state that it was *opened*. This memorandum cannot be true, if there were any foundation for the fact assumed for the purpose of objection; but certainly nothing appears to have been done contrary to what the act requires and the rule that "*omnia præsumuntur solemniter esse acta*" therefore applies.

I am, for these reasons, of opinion that none of the objections made to the *significavit* can be supported, and that the prisoner must be remanded.

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 [\*48]

\*OWENS v. DICKENSON.

1840: December 18, 19, 21.

The general engagements of a married woman are enforced by a court of equity against her separate estate, not as executions of a power of appointment, but on the principle that to whatever extent she has, by the terms of the settlement, the power of dealing with her separate property, she has also the other power incident to property in general, namely, the power of contracting debts to be paid out of it.

Where a married woman whose real estate was settled, on her marriage, to such uses as she should, by any deed or instrument in writing, attested by one witness, or by her will, appoint, and in default of appointment, upon trusts for her sole and separate use for life, with remainder over, made her will, in pursuance of the power, and thereby charged her real estate with payment of her debts: It was held that this was a good charge on the real estate of all her written engagements; and *semble*, also, of her debts generally, whether evidenced by writing or not. Held, also, that the proper form of a decree in a suit by a holder of her written engagement, on behalf of himself and all other creditors, for payment of their debts out of the real estate, was an inquiry what debts there were to be paid under the provisions of the will; and that the plaintiff must, therefore, prove his debt over again before the master.

By a settlement made in May, 1824, on the marriage of Mary M'Grier, widow of Hugh Jones, certain freehold messuages and hereditaments, the property of Mary M'Grier, were conveyed to two persons, to such uses as she should, by any deed or other instrument in writing, attested by one witness, or by her will, attested by three witnesses, from time to time appoint, and, in default of appointment, in trust to pay to or permit her to receive the

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rents and profits thereof, for her life, to and for her sole and separate use and benefit, independent of her then intended husband, and after her death, to the use of Thomas M'Grier, her son by a former marriage, and his issue as therein mentioned, with remainder over. By the same settlement certain stock in trade, furniture, and other effects of Mary M'Grier were assigned to the same persons, in trust for her sole and separate use during her life, and after her death for the said Thomas M'Grier absolutely.

Part of the property included in the settlement consisted of a freehold public house, with the fixtures and furniture thereto belonging.

\*In September, 1828, Mary Jones (formerly Mary M'Grier,) having [\*49] occasion for the sum of 210*l.*, agreed with the plaintiff (Moses Owens) that he should take the public house as her tenant, at the yearly rent of 40*l.*, and should purchase the license, fixtures, and furniture, for the sum of 210*l.*; and that the same sum should be repaid by Mary Jones to the plaintiff on his quitting the premises, and delivering up the license, fixtures, and furniture at six months' notice. The plaintiff accordingly took possession of the public house, fixtures and furniture, and paid the sum of 210*l.* to Mary Jones's order; and thereupon she executed a memorandum in the following words:—

"I do hereby agree to accept Moses Owens as my tenant of the public house situated at the east side of Sea Brow, with the privilege of letting it, and to return to the said Moses Owens the sum of 210*l.* which he paid for license, fixtures, and appurtenances, as per inventory, provided he leaves the said house within a given notice.

"Dated this 1st of September, 1828.

*" Mary ✕ Jones,  
Her mark."*

The plaintiff continued to occupy the premises, as tenant to Mary Jones, until the time of her death, in April, 1832.

Mary Jones, by her will, dated the 9th of February, 1832, and executed in the manner required by the power reserved in the settlement, after reciting the power, devised and appointed all her real estate to William Dickenson, William France, and Michael Oldfield, whom she also appointed her executors, in fee simple, upon certain trusts for the benefit of her son Thomas M'Grier for his life, and of other persons after his death; and \*she [\*50] charged her real estate with the payment of her debts, and funeral and testamentary expenses. The executors proved the will.

After the death of Mary Jones, which happened in the lifetime of her husband, the plaintiff continued to occupy the premises as tenant to Thomas M'Grier until the year 1836, when, in pursuance of a notice given to him for that purpose by Thomas M'Grier, he quitted the premises, and delivered up to him the license, fixtures, and furniture, and thereupon claimed to be paid the sum of 210*l.* as due to him from the estate of Mary Jones.

That demand having been refused, the plaintiff filed this bill, on behalf of

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himself and the other unsatisfied creditors of Mary Jones, against the trustees and executors of her will, and against Thomas M'Grier and the other persons beneficially interested under the will, praying that the estate, as well real as personal, to which the testatrix was entitled to her separate use, or over which she had a disposing power, might be applied in payment of the debts of the plaintiff and the other creditors, in a due course of administration.

The defendants, by their answers, disputed the debt, and insisted particularly on the suspicious character of the memorandum, as being written on a small slip of paper, signed only by a mark, and without any attesting witness. One of the plaintiff's witness, however, stated that he was present when Mary Jones affixed her mark to the memorandum, and saw her do it, though he was not formally an attesting witness; and the various circumstances which led to the agreement were also proved in evidence.

[\*51] \*The cause now came on to be heard before the Lord Chancellor.

Mr. Bethell and Mr. Spurrier, for the plaintiff, contended that the 210*l.* secured by the memorandum of September, 1828, was at the death of Mary Jones, a *debitum in presenti solvendum in futuro*, and that it was well charged by the will upon her real estate; and that her personal estate if she should appear to have left any, was also applicable to the payment of it; *Murray v. Barlee*.(a)

Mr. Wigram and Mr. J. Russell, for the defendants.—The memorandum which is too suspicious a document for the court to rely upon, must be put out of consideration; and then there will remain to the plaintiff nothing but a verbal or implied promise, which has never yet been held to bind the separate estate of a married woman. A contract must, in order to have that effect, be in writing, and even then can be enforced only against her personal estate and the accruing rents and profits of her real estate in the hands of her trustees: *Hulme v. Tenant*.(b) That was all that was decided in *Murray v. Barlee*. A married woman's contract has never yet been held to constitute a charge on the *corpus* of her real estate; and in this case her interest in the personal estate, comprised in the settlement, determined with her life. The charge of debts in the will of a married woman is inoperative, because she is, by law incapable of contracting debts: her contracts can only bind her estate by way of equitable appointment: *Field v. Soule*.(c)

[\*52] \*Mr. Bethell, in reply.

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Dec. 21.—THE LORD CHANCELLOR:—Two points were taken in the argument, one as to the honesty of the transaction and the truth of the case represented by the plaintiff, and the other as to the effect of the will of a married woman upon her separate property as applicable to the payment of this and other debts.

(a) 3 M. & K. 209.

(b) 1 B. C. C. 16.

(c) 4 Russ. 112.

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Now, certainly, where the title is made to rest on a document merely signed by the mark of the party, it is more probable, than in ordinary cases, that the party may not have been aware of its contents; for the inability to write may, perhaps, to a certain degree, imply the inability to read; and, therefore, such a document, standing alone, might be so far open to suspicion as to create a necessity for an inquiry; but in this case there are so many other circumstances connected with and leading to the agreement, that there does not appear to be anything to awaken the least suspicion. [His lordship then examined the facts of the case in detail, and proceeded as follows:—]

This married woman, as it appears by the settlement, had a separate estate, subject to her appointment by will or deed or other instrument in writing, attested by one witness. Having, by her mark, put her signature to the document which recognized the 210*l.* as a debt which, in certain circumstances, she was to be liable to pay to the plaintiff, she makes her will, and by her will charges all her debts upon property which she had power to dispose of.

\*Now that document alone, within the authority of cases which [\*53] have been decided, (a) would have been operative upon her separate estate, but not by way of the execution of a power, although that has been an expression sometimes used, and as I apprehend very inaccurately used, in cases where the court has enforced the contracts of married women against their separate estate. It cannot be an execution of the power, because it neither refers to the power nor to the subject matter of the power; [1] nor, indeed, in many of the cases, has there been any power existing at all. Besides, as it was argued in the case of *Murray v. Barlee*, if a married woman enters into several agreements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid *pari passu*; whereas, if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear, therefore, that there is nothing in such a transaction which has any resemblance to the execution of a power. What it is, it is not easy to define. [2] It has sometimes been treated as a disposing of the particular estate; but the contract is silent as to the separate estate, for a promissory note is merely a contract to pay, not saying out of what it is to be paid, or by what means it is to be paid; and it is not correct, according to legal principles, to say that a contract to pay is to be construed into a contract to pay out of a particular

(a) See, besides the cases before mentioned, *Heatley v. Thomas*, 15 Ves. 596; and *Bullpin v. Clarke*, 17 Ves. 365.

[1] It is sufficient that the execution be in the form prescribed by, and operate upon the subject matter of the power, without any direct reference to the power itself; for as was said by Leach, M. R.: "A gift of that of which a testator cannot dispose, except in execution of a power, necessarily manifests an intention to execute that power." *Hughes v. Turner*, 3 Myl. & Keen, 690, and see *ibid.* 696. *Hanlake v. Gell*, 1 Russ. & M. 515, 525, n. 1, and cases there cited. *Blagge v. Miles*, 1 Story's Rep. 426, 454. *Curtis v. Kenrick*, 9 Sim. 443. *Churchill v. Dibben*, *ibid.* 147 n. c. *Heyer v. Burger*, 1 Hoff. Ch. Rep. 18.

[2] As to the distinction between the power of disposing of property and the right of property, see *Hughes v. Turner*, 3 Myl. & K. 688.



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 1840.—Owens v. Dickenson.
 

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property, so as to constitute a lien on that property. Equity lays hold of the separate property, but not by virtue of any thing expressed in the contract; and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it. The [\*54] \*view taken of the matter by Lord Thurlow, in *Hulme v. Tenant*,<sup>(a)</sup> is more correct. According to that view, the separate property of a married woman being a creature of equity, it follows, that, if she has a power to deal with it, she has the other power incident to property in general; namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied.[3]

Now these considerations are important, because it was part of the argument that a married woman, although she can enter into a species of contract, and bind herself by a promissory note,<sup>(b)</sup> (for that was the case put,) yet that she cannot be considered as having creditors; and therefore, when she makes her will and directs that her debts are to be paid, that part of the will cannot be carried into effect. But all the cases suppose she can have creditors. The holder of her promissory note has her contract, which equity considers her capable of entering into; and it would be a very strong proposition to say that when she has, by an instrument under her hand, acknowledged her debt and promised to pay it, she is not to be considered as creating an obligation which binds her. There is, however, no ground for supporting such a proposition, and it would be interfering very much with the rights which this court considers are attached to the property of a married woman, to put such a construction on her contract.[4]

(a) 1 B. C. C. 16, see p. 21.

(b) See *Bullpin v. Clarke*, 17 Ves. 365.

[3] "In the earlier cases the doctrine was put upon the intelligible ground, that a married woman is, as to her separate property, to be deemed a *feme sole*; and therefore that her general engagements, although they would not bind her person, should bind her separate property. This however, is not the modern doctrine; for by that it seems to turn upon the intention of the married woman to create a charge upon her separate estate, either as an appointment, or as a disposition of it by a contract in the nature of an appointment." 2 Story's Eq. § 1401. The case in the text, to which the learned commentator has referred, but not as the controlling authority on the subject, seems to have replaced the doctrine "upon the intelligible ground."

[4] The defendant Armstrong, with his wife who was entitled to certain separate property, joined in a deed, the object of which was to raise an annuity out of the separate estate of the wife; but the granting part of the deed, and the covenants were in the name of Armstrong alone. It was held, that the separate estate of the wife was not bound. Lord Langdale, M. R. "The question is whether the separate estate of Mrs. Armstrong is to be bound by this deed. If she had been a covenanting party, I apprehend it would clearly create a charge upon her separate estate; or even if the deed had recited an agreement that she should be a surety for her husband, and that her separate estate should be made liable to this annuity, I apprehend that the court according to all the rules upon which it acts, would have held that the deed extended far enough to bind her separate estate, and create a charge thereon, although there might not have been any formal words to that



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\*In this case the debt is proved: there is nothing of suspicion to [\*55] make one suppose this was not a *bona fide* debt, or that the testatrix was not indebted to the plaintiff in that sum at the time she made her will. By her will she has charged her separate property with the payment of this, at least, among other debts; and therefore I think that, under the will, the liability of the separate property to pay this debt is established. But by her will she appoints her separate property to pay her debts generally, and therefore there must be an inquiry as to other debts; and the result of that inquiry may give rise to some further questions which it is not at present necessary to anticipate, because the authorities are very vague as to what are to be considered debts in this sense. I observe that in *Clinton v. Willes*,<sup>(a)</sup> Sir Thomas Plumer suggested a doubt whether it was necessary they should be secured by writing; and it certainly seems strange that there should be any difference between a contract in writing, when no statute requires it to be in writing, and a verbal promise to pay. It is an artificial distinction not recognized in any other case. On that point, however, I give no opinion at present. It must be referred to the master to inquire what debts there are to be paid under the provisions of the will, with liberty to state special circumstances.

A discussion then arose at the bar as to the form of the decree, it being suggested, on the part of the plaintiff, that he should at once be declared entitled to be paid the sum of 210*l.*, with interest, *pari passu* with the other creditors of the testatrix, out of the property which passed under her testamentary

(a) 1 Sug. Pow. 208, n.

effect. But the only circumstance relied on in this case is, that Mrs. Armstrong was a party to the deed, &c.—It is perfectly clear that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so, she may enter into a bond, bill, promissory note, or other obligation, which, considering her state as a married woman, could only be satisfied by means of her separate estate; and therefore, the inference is conclusive, that there was an intention, and a clear one on her part, that her separate estate, which would be the only means of satisfying the obligation into which she entered should be bound. Again, I apprehend it to be clear, that where a married woman having separate estate but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shows an intention to bind the interest which belongs to her, then though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have, shall be bound by her own act. But in a case where she enters into no bond, contract, covenant or obligation, and in no way contracts to do any act on her part:—where the instrument which she executes does not purport to bind or to pass any thing whatever that belongs to her, and where it must consequently be left to mere inference, whether she intended to affect her estate in any manner or way whatever, the case is entirely different either from the case where she executes a bond, promissory note, or other instrument, or where she enters into a covenant or obligation, by which she, being a married woman, can be considered as binding her separate estate. Though Mrs. Armstrong was a party to this deed, there is nothing in it which shows, on her part, an intention to bind her separate estate; on the contrary the conveyance and agreement is wholly on the part of the husband, &c. *Tullett v. Armstrong*, 4 Beav. 319. See *Crosby v. Church*, 3 Beav. 485, 489; *Stead v. Nelson*, 2 Beav. 245, 248, n. 1; *Knowles v. McCamely*, 10 Paige, 332, 346; *Brown v. Bamford*, 11 Sim. 127; 4 Rens. 114, n. 1.

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[\*56] appointment ; and \*that the inquiry should be, what other debts were charged on such property.

THE LORD CHANCELLOR :—Where there is a contest between specific incumbrancers on an estate, the plaintiff has only to prove his debt, once for all, at the hearing ; because all the parties interested in disputing it are then before the court. But, in a suit by one or more creditors on behalf of all, as every creditor has a right to question the claim of every other, because it may interfere with his own, and as all are not before the court at the hearing, the plaintiff in such a suit is called upon to prove his debt over again before the master, although he may have established it here : and I have known several instances in which the debt, after having been proved here, has failed before the master, and ultimately the bill has been dismissed. Now, in this case, the plaintiff, claiming, not by virtue of a specific charge, but under the will, must claim as being entitled under the description contained in the will ; and therefore the ordinary rule in creditors' suits applies directly to this case ; and the decree must be in the form I have mentioned. Of course the proof given here will be proof before the master in support of the plaintiff's claim. If there should be any defect in that proof, any of the other creditors, if there be such, will have a right to raise the question.[5]

[5] In a suit by residuary legatees of A., against the personal representatives of B., who was the executor of A., for payment of a debt due from B. to A., the amount of which was not admitted, and also for an account of the personal estate of A., praying also, unless assets were admitted, an account of the personal estate of B., and that being insufficient seeking to charge his real estate ; it was held that the plaintiff was not entitled to a declaration that a particular debt or sum constituted an item in the account to be taken, but that evidence to show that the defendant should be charged with such particular debt or sum was admissible. *Tomlin v. Tomlin*, 1 Hare, 236. But in a creditor's suit against an executor or administrator, if the debt of the plaintiff be admitted or proved, and the defendant admits assets, the plaintiff is entitled at the hearing to an immediate decree for payment. Wigram, V. C. "The suit is instituted by a simple contract creditor on behalf of himself and all other creditors, seeking the payment of a debt alleged to be secured by the promissory note of the intestate. The defendant, by his answer, says he believes the note to be a forgery, and that no debt was due to the plaintiff, but admits assets sufficient to pay the amount, and all other debts of the intestate. He suggests no ground for his belief as to the debt and note. Evidence has been gone into on the part of the plaintiff to prove the debt, and he asks an immediate decree for payment. The defendant says it ought to be referred to the master to take an account, not only of the estate, but of what other debts are owing from the intestate.—The reason for, and the principle of the usual form of decree, are stated in *Owens v. Dickenson*, but that reasoning has no application where assets are admitted, for the executor thereby makes himself liable to the payment of the debt. In such a case the other creditors cannot be prejudiced by a decree for payment of the plaintiff's debt, and the object of the special form of the decree in a creditor's suit fails. I entertained no doubt upon this point, nor can I, upon inquiry find that it was ever doubted in the other branches of the court." *Woodgate v. Field*, 2 Hare, 211. In a creditor's suit a question arose as to the proper form of the affidavit to be made by a bond creditor in proving his debt under the decree. The Lord Chancellor (Lyndhurst) inquired of the masters as to the practice in their offices, eight of whom certified, "that it is not the practice in our offices to require that the affidavit of debt should state the consideration for which the bond was given, as in the case of simple contract debts ; and that it is sufficient if the affidavit do state that the deceased was indebted in so much money upon the bond. And that if a bond be not twenty years old, we require the execution of it to be proved in the regular way ; and that, when a case of sus-

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1840.—The London and Birmingham Railway Company v. Winter.

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**\*LONDON AND BIRMINGHAM RAILWAY COMPANY v. WINTER. [\*57]**

1840: December 21, 24.

In a suit for specific performance of a written agreement, a parol variation not set up by the answer, but coming out on the cross-examination of the defendant's agent who was one of the plaintiff's witnesses, is a proper subject for inquiry before the court finally disposes of the case: *Semble*.

But the plaintiff consenting to adopt it as part of the contract, a specific performance of the contract with the parol variation was decreed immediately with costs.

An objection to a bill by an incorporated railway company for specific performance of a contract, for the purchase of land, entered into by their agent, that it did not appear that the agent was authorized under the corporate seal, and therefore that there was no mutuality, overruled, on the ground that the company had, before the bill was filed, not only acted on the contract by entering into possession of the land, but actually made a railroad over it.

THE bill was filed by an incorporated railway company, praying the specific performance of an agreement, alleged to have been entered into in the month of September, 1835, between one Griffin, a land surveyor, on the part of the defendant, and a person of the name of Cooke, as agent of the company, for the sale to the company for the purposes of the railway, of part of a piece of land belonging to the defendant, of which the company had been allowed to take possession; and also praying an injunction to restrain the defendant from commencing an action of ejectment against the company.

The agreement, as stated by the bill, was that the company should purchase from the defendant so much only of his land as was actually required for the construction of the railway, that is to say, 1A. 1R. 16P.; and should pay to the defendant, as the consideration for the same, and also as compensation for all loss and inconvenience which should ensue to him, from the severance of his land, or otherwise from the construction of the railway, the sum of 120*l*. The agreement, as so stated, was evidenced by a memorandum which was entered in a book belonging to Cooke, and was signed by Griffin, a counterpart being entered in a book belonging to Griffin and signed by Cooke. The memorandum was in the following terms:—

| *No. Hemel Hempstead. |   |   |    | Isaac Winter.              | £     | [*58] |
|-----------------------|---|---|----|----------------------------|-------|-------|
| 33                    | 0 | 2 | 17 | Arable Seed Land           | 80    |       |
| 34                    | 0 | 2 | 39 | Arable Clover Compensation | 40    |       |
| <hr/>                 |   |   |    |                            | <hr/> |       |
| A 1 1 16              |   |   |    |                            | 120   |       |
| <hr/>                 |   |   |    |                            | <hr/> |       |

picion is raised as to the consideration, we then inquire into the validity of the bond." The Lord Chancellor adopted the rule of practice as laid down in the certificate. *Rundell v. Lord Rivers*, 1 Phillips, 88. "This affidavit," says Wigram, V. C. "is required to extend to the consideration of a simple contract debt, but not to the consideration of bond, or other specialty debts.—The affidavit is not required or received as evidence of the demand, but only to repel the possible implication that the creditor may be demanding that which he knows is not due." *Whitaker v. Wright*, 2 Hare, 310, 315. In this case it was held that under a decree in a suit by a bond creditor on behalf of himself and the other creditors on the estate, the executor may, in the master's office, impeach the validity of the bond upon grounds which were not in issue in the cause at the hearing.

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"Mr. Winter reserves two pieces, viz. 5p. and 2a., but without requiring the company to make any way to them.

"1835, Sept. 23d.

• Agreed, *John Griffin*."

Shortly after the execution of the agreement, an abstract of title to the land was delivered by the defendant's solicitor to the solicitor of the company. In the course of the month of November following the title was accepted, and a draft conveyance having been approved by the defendant's solicitor was engrossed; but on its being tendered to the defendant, in the month of December, for execution, he refused to execute it.

In the meantime, by an arrangement, of which the defendant was apprized, between the solicitors of the respective parties, the company were let into possession of the land in question, and proceeded to construct a railway over it. The defendant having subsequently threatened to bring an ejectment for land, this bill was filed.

The defendant, by his answer, admitted that he had authorized Griffin to treat for the sale of the land in question, but alleged that he had instructed him to stipulate for 120*l.* per acre as the price of the land, and for a communication by a bridge between two small portions of his land, which would be severed by the railway, and that he had never authorized him to enter into a contract on the terms stated in the bill.

[\*59] "This representation was not only unsupported by evidence, but was directly contradicted by Griffin, upon being examined as a witness in the cause on the part of the company, who stated that although the defendant had at first desired him to stipulate for a communication by a bridge between the two pieces of his land which would be severed by the railway, yet that he had subsequently consented to waive such stipulation, on its being represented to him by Griffin that the company would never accede to it, and that his ultimate instructions to Griffin were to make the best bargain with the company that he could. It came out, however, on Griffin's cross-examination, that he had been employed, about the time of the contract in question, by numerous landowners in the neighborhood, to treat, on their behalf, for the sale to the company of such portions of their land as were required for the purposes of the railway, and that there had been a general agreement between him and Cooke, applicable to all contracts of that kind entered into between them, that the company should pay separately for any timber that should be growing on the lands purchased, and should also pay the surveyor's expenses, and the costs and charges of making out the vendor's title; and that these points were so well understood between him and Cooke, that it was considered unnecessary to make them part of the written contract.

It did not appear that the defendant had ever before the institution of the suit insisted on the stipulation disclosed by Griffin's evidence, relative to timber and expenses of sale, nor did he claim the benefit of that stipulation by his answer.

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The cause now came on to be heard before the Lord Chancellor.

\*It was contended, for the defendant, in the first place, that the [\*60] written contract did not contain all the terms of agreement proved to have been entered into between Cooke and Griffin; and that the contract of which the bill sought a specific performance was not the agreement proved, but an imperfect contract, which the court would not enforce; *Mortimer v. Orchard*,<sup>(a)</sup> *Reynolds v. Waring*.<sup>(b)</sup>

It was contended, secondly, that a corporation could only bind itself by its corporate seal; and that there was no evidence that Cooke was so appointed agent of the company; and if he was not, there was no mutuality in the contract; *East London Water Works Company v. Bailey*,<sup>(c)</sup> *Dunston v. The Imperial Gas Light Company*.<sup>(d)</sup>

Mr. *Wigram* and Mr. *Bacon* appeared for the plaintiffs.

Mr. *Richards*, Mr. *Turner*, and Mr. *J. Russell* for the defendants.

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Dec. 24.—THE LORD CHANCELLOR, on this day, asked Mr. *Wigram*, the counsel for the plaintiffs, whether his clients were willing to do that which Griffin, on his cross-examination, stated was understood between himself and Cooke.

Mr. *Wigram* said the company had already offered the defendant his expenses, and that there was no timber on the land; but that, if there was any, they were willing to pay for it.

\*THE LORD CHANCELLOR, after expressing his opinion that upon [\*61] the testimony of Griffin, and upon the evidence afforded by the conduct of the defendant, it was clear that Griffin had authority to make the contract which he did make, and stating, that upon this point his lordship did not entertain any doubt at the time at which the case was argued, proceeded as follows:—

I wished, however, to look at the papers, in consequence of a statement which came out on the cross-examination of the defendant's agent, by which it appeared there was an understanding between him and the agent of the company, that, in all contracts for land required by the company, the value of any timber on the land, the expense of investigating the title, and other expenses which, unless there was some special agreement between the parties, would fall on the vender, should be paid for in addition to the purchase money specified in the contract: and that, in consequence of this understanding, these points were not included in the written contract in question. This was urged as a reason why the court should refuse a specific performance. It cannot possibly have that effect; but it might have this effect, namely that the court would not decree a specific performance without taking care that the party should have the benefit of such an understanding. Such an understanding cannot operate to defeat the contract; because, according to the

(a) 2 Ves. jun. 243.

(b) 1 Younge, 346.

(c) 4 Bing. 283.

(d) 3 B. & Adol. 125.



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statement of the witness, it never was intended to form part of the written contract, but was purposely kept out of it.

This is not a case within the meaning of those decisions in which the court has said that it will not specifically perform the contract with a variation. If the court finds a written contract has been entered into, and the plaintiff

says, "That was agreed upon, but then there were certain other terms [\*62] added, or certain variations "made," the court holds that in such a

case the contract is not in the writing, but in the terms which are verbally stated to have been the agreement between the parties ; and, therefore, refuses specifically to perform such an agreement. On the other hand, it is quite competent for the defendant to set up a variation from the written contract ; and it will depend on the particular circumstances of each case whether that is to defeat the plaintiff's title to have a specific performance, or whether the court will perform the contract, taking care that the subject matter of this parol agreement or understanding is also carried into effect, so that all parties may have the benefit of what they contracted for. That this is the rule of the court is sufficiently established in many cases, of which I will only mention three, *Joynes v. Statham*,(a) by Lord Hardwicke ; *Townshend v. Stangroom*,(b) by Lord Eldon ; and *Ramsbottom v. Gosden*,(c) by Sir William Grant.[1] In the last mentioned case, Sir William Grant put it to the plaintiff whether he would take a specific performance with the performance of the condition established by parol testimony, or whether he would have the bill dismissed. The only doubt, therefore, I should have had if Mr. Wigram had declined, on the part of the plaintiffs, to comply with the terms mentioned by the witness, would have been, whether, in this case, the variation was so stated as to entitle the defendant to the benefit of it ; because he does not state it in his answer, nor does he prove it, nor attempt to prove it ; but it comes out on the cross-examination of the plaintiffs' witness. On such a statement, not put in issue between the parties, and which the plaintiffs had, therefore, no opportunity of meeting, I should certainly not

have thought it right to act ; but as it appears, on the evidence before [\*63] the court, that such an understanding existed, I should probably have thought it a fit subject of inquiry, before I finally disposed of the case, if the course taken by the plaintiffs had not made it unnecessary for me to consider the point.

There is only one other point, which I need hardly allude to, namely, the objection that there is no mutuality in this contract, in as much as the agent of the plaintiffs was not appointed under their corporate seal, and therefore they are not bound by his acts.[2] It is not very easy to reconcile all the

(a) 3 Atk. 388.

(b) 6 Ves. jun. 328.

(c) 1 Ves. & Beames, 165.

[1] As to parol variation or waiver of a written contract, see *Goss v. Lord Nugent*, 5 Barn. & Ad 58 ; *Blood v. Goodrich*, 9 Wend. 68 ; *Lander v. Clark*, 1 Hall, 361 ; Pal. Pr. & Ag. (ed. by Dunl.) 257, n. 3.

[2] Whether a corporation may appoint an agent, or attorney, otherwise than under seal, see



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 1840.—*Corsbie v. Free*.
 

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cases on the subject; but the case of the *Mayor of Stafford v. Till*(a) is very similar to the present, as to the circumstances of the parties to the contract; there the Court of Common Pleas thought that the corporation were entitled to support an *assumpsit* for use and occupation against a tenant, who, though he did not hold of them by deed, had had actual enjoyment of their land.[3] So, here the plaintiffs have not only been acting on the contract by entering into possession of the property, but have actually destroyed the property enjoyed by the defendant previously to the contract, by making their railway over it. If, therefore, it were necessary for the defendant to file a bill against these plaintiffs, I have no doubt but that they would be compelled specifically to perform the contract.[4]

For these reasons, the plaintiffs undertaking to pay the value of the timber, if any, that was upon the land, and the expenses referred to by their witness (the amount to be ascertained by the master if the parties differ,) there must be a decree for a specific performance according to the terms of the contract, with costs.

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\**CORSBIE v. FREE* and Others.

[\*64]

1840: December 22, 24.

By a marriage settlement, after reciting that the intended wife was possessed of 1500*l.* which the husband was to have for his own use as soon as the marriage should take effect, and that she had also a vested interest in the real and residuary personal estate of a testator, amounting to the sum of 32,000*l.* and upwards, which would be equally divided amongst eight children, of whom she was one, on the death of a tenant for life, it was witnessed that in consideration of the intended marriage and of the sum of 1500*l.* then in the possession of the intended wife, and also of the said vested interest of the value of 4000*l.* and upwards, the husband covenanted that his heirs, executors, and administrators should, immediately after his decease, pay to the trustees of the settlement the sum of 4000*l.*, to be held upon certain trusts for the wife and the children of the marriage; but the deed contained a proviso, that the heirs, executors, or administrators of the husband should pay all other debts which the husband should owe at his death in preference to the 4000*l.*, and that they should not be bound to pay the 4000*l.* unless the assets of the husband should be more than sufficient to pay all his other debts. The husband became a bankrupt before the death of the tenant for life, but he survived the tenant for life, and afterwards died before the wife's share was actually paid.

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(a) 4 Bing. 75.

Pal. Pr. & Ag. (ed. by Dunl.) 155, n. a. The American decisions answer the question decidedly in the affirmative; the English authorities are by no means so clear.

[3] *Beverley v. The Lincoln Gas Light &c. Co.*, 6 Ad. & Ellis, 829. *Arnold v. The Mayor &c. of Poole*, 4 Mann. & Gr. 896. *Fishmongers Co. v. Robertson*, 5 Mann. & Gr. 131. *The Mayor &c. of Carmarthen v. Lewis*, 6 Car. & Payne, 608. Pal. Pr. & Ag. (ed. by Dunl.) 155, n. a.

[4] That here was an adoption by the corporation of the act of their agent, assuming it to have been originally unauthorized, which would be binding on them; see *The New England Marine Ins. Co. v. De Wolf*, 8 Pick. 56; *Foss v. Harbottle*, 2 Hare, 493; Pal. Pr. & Ag. (ed. by Dunl.) 155, n. a. 156, n. f. 190, n. c.

1840.—*Corsbie v. Free.*

*Semble* : The husband's covenant did not operate as a purchase of the wife's reversionary share under the will ; but

Held, that, at all events, the husband's assignees were not entitled to receive the share without performing the covenant.

ROBERT BUCK, by his will, dated the 1<sup>st</sup> of September, 1763, gave, devised, and bequeathed all his real estate, and all the residue of his personal estate (which he directed to be invested, as soon as convenient, in the purchase of land,) to certain persons, upon trust to apply the income as therein mentioned : and be directed that, after several previous limitations should have determined, the rents and profits of his real estates, and the interest and profits of the then residue of his personal estate, should be paid to William Buck and Samuel Buck, and several other persons therein named, and the survivors and survivor of them for life, and that after the decease of such survivor his real estate, and the then residue of his personal estate, should be divided into as many shares as there should be children of William Buck and Samuel Buck then living, such shares to be conveyed, paid, and assigned to them on their respectively attaining the age of twenty-one [\*65] years, \*and the income in the meantime to be applied for their maintenance, with cross remainders amongst them in case any of such children should die under that age.

In August, 1800, there being, in all, eight children of William Buck and Samuel Buck *in esse*, including the plaintiff, who was a daughter of William Buck, some only of such children being then of age, and several of the tenants for life named in the will being still alive, an agreement was entered into, by an indenture dated the 14th of August, 1800, to which the eight children were severally made parties, and which was afterwards executed by those who were then minors as they successively came of age, whereby, after reciting the will, and reciting that the parties thereto were desirous of destroying such benefit of survivorship amongst themselves as might arise by any of them happening to die in the lifetime of the then tenants for life, or the survivor of them ; it was mutually agreed that the same share of the real and residuary personal estates of the testator, to which they would be severally entitled in case they should severally be living at the death of the surviving tenant for life, should be conveyed, paid, and assigned to the heirs, executors, or administrators of any of them who should happen to die before that time, or to such person or persons as should then be entitled to the share of the party so dying, by settlement, appointment, or devise, or otherwise howsoever.

In the year 1812, the plaintiff married John Corsbie ; and, on that occasion, a settlement was made between John Corsbie, of the first part, William Buck, the father of the plaintiff, and who was the last surviving tenant for life, and the plaintiff, then Anne Buck, of the second part, and two trustees of the third part, whereby, after reciting the intended marriage, and reciting that [\*66] \*William Buck had given to Anne his daughter the sum of 1500*l.* of which she was then possessed, and which John Corsbie was to have

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 1840.—*Corsbie v. Free*.
 

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and take to his own use as soon as the marriage should take effect, and further reciting that Anne Buck had a vested interest in the real estate, and also in the residue of the personal estate of the late Robert Buck, amounting to the sum of 32,000*l.* and upwards, which would be equally divided amongst the children of Samuel Buck, then deceased, and the said William Buck, of which children there were eight in all, on the death of William Buck (as by reference to the will of the said Robert Buck, and to an indenture of eight parts, dated the 14th of August, 1800, which indenture was executed by all the children of the said Samuel Buck and William Buck, and by which they had destroyed the benefit of survivorship created by the said will, would more fully appear;) it was witnessed, that, in consideration of the intended marriage, and of the sum of 1500*l.* then in the possession of Anne Buck, and also of the vested interest of the value of 4000*l.* and upwards which the said Anne Buck had in the real estate, and also in the residue of the personal estate of Robert Buck deceased, expectant on the death of William Buck, John Corsbie did thereby covenant, promise, and agree, to and with the trustees, that his heirs, executors, and administrators should and would, immediately after his decease, well and truly pay, or cause to be paid, to the trustees, or the survivor of them, or the executors or administrators of such survivor, the sum of 4000*l.*, in trust for Anne Buck during her life in case she should survive her husband, and, after her death, upon certain trusts for the benefit of the children or child of the marriage. The settlement concluded with a proviso, that it was thereby agreed between the parties thereto, and their true intent and meaning was, that the heirs, executors, or administrators of John Corsbie should pay and satisfy all and every other debts [\*67] which he should owe at the time of his death, as well those due upon specialty as simple contract, in preference to the 4000*l.* above mentioned; and that they should not, by any covenant, article, clause, or agreement therein contained, be bound or compellable to pay the 4000*l.* unless John Corsbie should have assets more than sufficient to pay and satisfy all his other debts, any thing to the contrary therein contained notwithstanding.

In the year 1815, John Corsbie became a bankrupt, and, in the year 1819, William Buck, the last surviving tenant for life, died, whereupon the trust property became divisible into eight shares, no child either of William Buck or Samuel Buck having been born since the year 1800. Accordingly, the real estate was sold, with the concurrence of all parties interested, for the purpose of distribution; but in consequence of questions which arose as to the extent of the plaintiff's right and interest in her share, and from other causes, that share was retained by a trustee in his hands until the year 1837, when the sum of 5842*l.* 10*s.*, being the admitted amount of her share, including the accumulations of income from the death of the surviving tenant for life, was paid to the official assignee in the bankruptcy, upon his undertaking to hold it without prejudice to any equity to which the plaintiff was, before such payment, entitled, as the wife of the bankrupt, to allowance there-

1840.—*Corsbie v. Free*.

out, in like manner as if the same had remained in the hands of the trustee. Shortly afterwards, John Corsbie died, and then this bill was filed by the plaintiff, his widow, against the official assignee and the creditors' assignees under her late husband's bankruptcy, praying that the defendants [\*68] might be ordered to account for and pay to the "plaintiff" so much of the 5842*l.* 10*s.* as arose from the real or personal estate of the testator, with interest from the death of her husband, and also to account for and pay to her so much of the residue of that sum as would have been a fit and proper allowance to her out of the same for her maintenance during the lifetime of her husband, or that her right and interest in the fund might be ascertained and declared, and that the defendants might be ordered to pay to her what she should be found entitled to.

The cause now came on to be heard before the Lord Chancellor.

Mr. *Tinney* and Mr. *Loftus Wigram*, for the plaintiff, contended that the husband's covenant operated as a purchase only of the 1500*l.* and such interest in the wife's reversionary property as he would acquire by the marriage, and not of the absolute interest in that property; but that, at all events, the assignees could not appropriate the fund without performing the covenant.

As the principal arguments urged in support of this view of the case were adverted to by the Lord Chancellor in his judgment, it is not considered necessary to state them here. The cases cited were *Heaton v. Hassell*,<sup>(a)</sup> *Carr v. Taylor*,<sup>(b)</sup> *Holt v. Holt*.<sup>(c)</sup>

Mr. *Spence*, Mr. *Richards*, and Mr. *Wood*, for the defendants.—The amount of the sum which the husband covenanted to settle, affords strong evidence of an intention that he should be the purchaser of the wife's [\*69] share "under the will, for that amount was evidently determined by the supposed value of the share, which was then considered to be about 4000*l.* If that had not been the intention, the share would have been included in the settlement on the children, as well as the 4000*l.* which the husband covenanted to pay. The recital that the husband was to take the 1500*l.*, which was immediately tangible, "for his own use," affords no presumption that he was to take a partial interest only in the other property. If it be said that the assignees are not entitled to this fund, because the husband died without being able to perform his covenant, the answer is that the same argument was urged in *Basevi v. Serra*<sup>(d)</sup> without success.

[THE LORD CHANCELLOR :—In that case, the husband was still living, and might yet perform his covenant, and the court would not presume that he would not do so.]

In this case also the share became payable, though it was not actually paid, before the death of the husband, and therefore it did not survive to the wife: and besides, the covenant is, by the express terms of it, conditional, for it pro-

(a) 4 Vin. Ab. p. 40, pl. 11, n.

(b) 10 Ves. 574.

(c) 2 P. Wms. 648.

(d) 14 Ves. 313.

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1840.—Corbie v. Free.

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vides that it shall only take effect out of the assets which may remain after payment of all the husband's other creditors.

Mr. *Tinney*, in reply.

At the conclusion of the argument, the Lord Chancellor asked whether there was any child of the marriage ; to which it was answered that there was one son.

THE LORD CHANCELLOR said that, in one view of this case, the son was materially interested ; for if the fund \*were to be restored by [\*70] the assignees on account of the non-performance of the covenant, a question would arise whether it would not be subject to the trusts of the settlement ; but his lordship added, that in this cause he could not decide anything against the son.

It was then stated that the son was of age, and was willing to waive all right to the fund as against his mother.

THE LORD CHANCELLOR said that in that case his lordship had only to consider the question as between the plaintiff and the assignees.

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*Dec. 24.*—THE LORD CHANCELLOR:—In this case, previous to the marriage contract which took place in 1812, the situation of the property was this:—the intended wife, who is the plaintiff in this suit, was possessed of a sum of 1500*l.* absolutely, and under the will she was entitled to a certain share of other property expectant upon the death of two or three persons who were entitled for life. Upon the death of those persons, that property, which consisted partly of real estate, and partly of personal estate, by the will directed to be invested in land, was to be divided amongst certain classes of children, of whom the wife was one.

In the year 1800, these children, having only contingent shares, inasmuch as the property was to be divided among such of the classes described as might be living at the death of the surviving tenant for life, a deed was entered into for the purpose of destroying that contingency, and giving vested interests in their shares to the several children then living ; and the provisions of that instrument are not immaterial to the construction \*to be put upon the marriage articles : for it evidently contemplates [\*71] that the children might so deal with their expectant shares as that other persons might, when the time of payment should arrive, be the parties to receive them, and accordingly it provides that, in such an event, their shares should be conveyed, paid or assigned to the persons who then might be entitled, by settlement, appointment, devise, or otherwise, to stand in their place.

It appears that, on the marriage of one of these children, namely the plaintiff, who was also entitled, as I before stated, to the sum of 1500*l.*, this very singular provision is made in the marriage settlement. [His lordship here read the recitals of the settlement.] When, therefore, the settlement is speaking of property which the husband is to take, it states that it is property which he is to take unto his own use so soon as the marriage shall take



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 1840.—*Corbie v. Free*.
 

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effect; and if the same intention had existed with reference to the other portion of the wife's property, namely, her reversionary share under the will, one would have expected the same expression to be used, namely, that, after the death of the tenant for life, when the testator's property should be divided, the share of the intended wife should be received by the intended husband for his own use and benefit. But it is not so recited; on the contrary, it is recited that that property was to be divided among the children of Samuel Buck and William Buck, of whom the intended wife was one; that is to say, her share was to be paid to her under the will, not alluding to any change of interest to take effect by means of the settlement. Then after referring to the deed by which the contingency had been destroyed, and the children had attained vested interests, the deed proceeds in the following terms: [His lordship read the statement of the consideration and the terms of the covenant.]

[\*72] \*Now, certainly, a very marked distinction runs through the whole of these recitals between the 1500*l.* which the intended wife had, and which the husband was to receive for his own use, and that future expectant interest which the wife was to become entitled to on the death of the tenant for life; and, if it were necessary to come to any conclusion upon the terms of the settlement,—which it is not, owing to the circumstances I am presently about to mention,—it would be very difficult to show, on the face of this settlement, evidence of an intention that the husband should become the purchaser of that future expectant interest. On the contrary, I think the true construction would be the other way: and, if the fund were to be considered as consisting exclusively of personal estate, it would be absolutely necessary that the husband, or those who claim through him, should be able to show, upon the face of this instrument, that he was to be the purchaser of it; because, inasmuch as he died before it was reduced into possession, it would survive to the wife,[1] unless the wife had parted with her interest in it by the settlement. Part, however, of that property consisted of real estate; and, in putting that construction upon these expressions, you must suppose the intention to have been that the husband was also to become the purchaser of the wife's real estate. Now there is not only no expression referring to that intention as to the wife's real estate, but every expression used in the settlement with reference to the reversionary part of her property shows that the real estate was to remain just as it was at the time the contract was entered into, and was not to be considered as purchased by, or conveyed to, the husband.

However, as I have already observed, it is not necessary to come to any conclusion upon that subject, because it appears that, while this property of the wife's [\*73] \*was still outstanding, the husband became a bankrupt, and then died, unable, of course, to perform any part of the covenant which he had entered into; and the second question which arises

[1] *Renwick v. Renwick*, 10 Paige, 424.



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1840.—*Corebie v. Free*.

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between the plaintiff and the defendants is this, whether the assignees of the husband can claim that property, as part of his estate, leaving his covenant to pay the 4000*l.*, the subject of the settlement, unperformed. If this had been an absolute covenant by the husband, unaffected by any other provision, I do not apprehend that any question of that sort would have been urged at the bar, inasmuch as those who are claiming the performance of a contract of any kind, are never in a situation to do so, unless they are themselves prepared to fulfil what they have undertaken on their own part. But the peculiarity of this case, as it is said, arises from there being this provision in the settlement, that the representatives of the husband shall not be called upon to pay the 4000*l.*, unless there is property enough left to pay the husband's other creditors; and it is said, therefore, that the covenant is not broken, inasmuch as he died insolvent. It would be very easy, if that were the construction of the settlement, for a party to evade the covenant; he would have nothing to do but to get rid of the money by which the covenant is to be performed, and then tell those with whom he has contracted that he has not broken his covenant. It is obvious, the meaning of that provision was, not to interfere with the rights of the parties who claim the benefit of the contract, as parties to the contract, but only to protect the *bona fide* creditors of the husband; in other words, to prescribe the order in which his assets were to be administered, so that others, to whom he had become indebted, should be paid in preference to those who claimed the benefit of this covenant.

\*In the case *Mitford v. Mitford*,<sup>(a)</sup> Sir William Grant considers [\*74] this species of right as operating as a sort of lien upon the fund which the party is claiming; and, where a husband was unable to perform his covenant, and yet claimed the portion of the wife's property which under the articles he was entitled to, it was considered that the parties, who were entitled to claim the benefit of the covenant, had a right to insist on that portion of the fund being applied in satisfaction of the covenant. Though it is not very distinctly expressed that appears to be the view taken of the matter by Sir William Grant. But whether that be so or not, it is evident that where both sums are due, that is, where the covenant is become due and the money has not been received, to allow the husband, or those who claim through him, to receive a fund which was the consideration for his covenant, while, on the other hand, he is not in a situation to perform that covenant, would be neither more nor less than putting the purchaser into the possession of his purchase without taking care that the price was paid.

In a case which was referred to, of *Basevi v. Serra* <sup>(b)</sup> Sir William Grant alludes to the particular state of circumstances which occurs here. In that case the husband was alive, and his covenant was to take effect only upon his death. It is true, there was every probability, in his circumstances at that time, that he would not be able to perform his covenant; but the pro-

(a) 9 Ves. 96.

(b) 14 Ves. 313, see p. 317.

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 1840.—*Corbie v. Free*.
 

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perty of which he was the purchaser was then the subject matter of adjudication; and the question was, whether those who claimed through him were to receive the property, there being a covenant in the settlement which was unperformed, and properly so, because the time was not come [\*75] \*when it was to be performed. Sir William Grant there says, in effect, I cannot arrest this money in order to secure the performance of the covenant, because the parties have thought proper to trust to the covenant, and not to make the husband's title to the money depend upon the performance of that covenant. So, if a party selling an estate chooses to stipulate that the contract shall be completed, and the land conveyed, trusting for the payment of the purchase money to the personal obligation of the purchaser, he cannot afterwards, say you shall not have the estate before you pay; because, under the contract, the right to a conveyance is not dependent on the payment of the purchase money. But, says Sir William Grant, if the time had come, when the covenant was to be performed, and the consideration money was to be paid, the court would not permit the party to receive that which he had purchased without taking care that he paid the stipulated price for it. The latter part of Sir William Grant's judgment comes precisely within the present case, because here the time has arrived when the consideration money is to be paid for that which the husband, or those who represent him, now claim. I cannot, therefore, entertain a doubt but that the assignees are not entitled, even if the construction of the settlement were in their favor, to demand this money without performing the husband's covenant, that is to say, paying the purchase money for that which now they seek to have; and, considering, as I do, that the provision about the creditors of the husband was not intended to relieve the husband from his covenant, but merely to prescribe the mode in which his assets were to be administered, I have no doubt that the husband's estate was liable to that covenant, notwithstanding his having died insolvent. And, therefore, as the plaintiff and her son do not differ, as between themselves, respecting the mode in [\*76] which the money is to be applied, I \*think that as between them and the assignees, they are clearly entitled to have this money applied in satisfaction of the covenant; and that the assignees are not entitled to it, as against them, without paying the 4000*l.* for which the covenant was made.[2]

After this declaration of his lordship's opinion as to the rights and liabilities of the parties, it was arranged between them that the defendants should pay to the plaintiff 4000*l.* and interest from the death of the husband, and that, after paying the costs of the suit out of what should remain of the fund, they should retain the surplus.

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[2] That the assignees of a bankrupt take no higher title than existed in the bankrupt himself, and subject to the same equities; see, *Lyster v. Burroughs*, 1 Dru. & Walsh, 176; *Ex parte Simpson*, 1 Deac. 47; *Fletcher v. Morey*, 2 Story's Rep. 555; *Winsor v. M'Lellan*, id. 493; *Mitchell v. Winslow*, id. 630; *Burridge v. Row*, 1 Yo. & Coll. C. C. 183; Pal. Pr. & Ag. (ed. by Dunl.) 83 n. (A.); *Blunden v. Desart*, 2 Conn. & Law, 118, 127.

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1840.—In the Matter of The Earl of Carysfort.

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**In the Matter of THE EARL OF CARYSFORT, a Lunatic.****1840 : December 24.**

An annuity allowed out of the income of the lunatic's estate, as a retiring pension to an old personal servant of the lunatic, who was obliged to retire from his service by reason of age and infirmity.

UNDER a reference to the master to inquire and certify whether, having regard to the nature of the lunatic's malady and to his fortune and capabilities of enjoyment, it would be fit and proper that any, and, if any, what sum should be allowed for his maintenance and support in addition to the sum of 1250*l.* per annum then allowed for that purpose, the committees of the person of the lunatic proposed, that an additional annual allowance of 350*l.* should be made for the maintenance and support of the lunatic personally, and that a further sum of 60*l.* per annum should be allowed as a retiring pension to one John Wright, who had lived with the lunatic, as his personal servant, from the year 1817, when he was found a lunatic, down to the month of June, 1840, but whose age and infirmities having rendered him [\*77] incapable of giving that attention to the lunatic which his malady required, it was considered necessary that he should retire from the lunatic's service, and that his place should be taken by a more active person.

The master, by his report, after approving of the annual sum of 350*l.* as an additional allowance for the maintenance and support of the lunatic, submitted the proposed further allowance of 60*l.* per annum for John Wright to the judgment of the Lord Chancellor.

It appeared that, besides some other property of small amount, the lunatic was tenant in tail in possession of real estates in Ireland of the gross annual value of 10,000*l.*

The petition of the committees, to confirm the master's report prayed that both the above mentioned sums of 350*l.* and 60*l.* might be allowed for the maintenance and support of the lunatic, and be paid to them out of the rents and profits of the real estate in Ireland.

Mr. *Sidebottom* appeared in support of the petition.

Mr. *Calvert* appeared for the next of kin, and consented.

THE LORD CHANCELLOR said he thought the proposal as to the old servant very reasonable ; but asked whether there was any precedent for it.

On a subsequent day, Mr. *Sidebottom* stated that no precedent could be found, but that he was instructed to say, on behalf of the committees, that they were satisfied that the allowance was one which the lunatic, if he should ever recover, would approve ; and the Lord Chancellor made the order.

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1841.—Whitehead v. North.

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[\*78]

\*WHITEHEAD v. NORTH.

1841: January 14.

The 45th general order only enables the court to supply something which may make an existing direction complete, and not to make a new direction; therefore, where a decree had directed an account of the real estates of a testator sold since his death, and of those which remained unsold, but had omitted to direct an account of the proceeds of such estates as had been sold: Held, that such omission could not be supplied upon petition, under that order.

The 56th general order applies only to proceedings in the master's office; and therefore a plaintiff, from whom the master has taken the conduct of the suit under that order, is not thereby precluded from afterwards making an application to the court in the suit.

THE decree had directed an account of the real estates of the testator sold since his death, and of those which still remained unsold, but had omitted to direct an account of the moneys received from the sale of such estates as had been sold.

The plaintiff presented a petition for leave to supply that omission, under the 45th general order of 1828, which provides that clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before enrolment, be corrected, upon petition, without the form and expense of a re-hearing.

The Vice-Chancellor having refused to make the order, the application was renewed before the Lord Chancellor.

Mr. *Wakefield* appeared in support of the petition.

Mr. *Richards*, for a defendant to whom the master had under the 56th general order of 1828, committed the prosecution of the decree, in consequence of the default of the plaintiff, insisted that, under such circumstances, it was not competent to the plaintiff to make the application.

THE LORD CHANCELLOR said that the 56th order, by which the [\*79] master was authorized to take the \*conduct of the suit from the plaintiff and give it to another party, was confined to proceedings in the master's office, and did not prevent the plaintiff from afterwards making an application to the court. As to the object of the petition, however, the omission sought to be supplied was a very important alteration. The 45th order only enabled the court to supply something which would make an existing direction complete; but what was asked was quite a new direction, namely, that an account might be taken.

The petition was dismissed.

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 1841.—Richards v. Platel.
 

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## RICHARDS v. PLATEL.

1841: January 14.

The lien of a solicitor on the papers of his client for the amount of his bill is equivalent to a contract ; and, therefore, a solicitor will not be ordered to deliver up such papers until he is actually paid ; and *semble* that payment into court of a sum of money, is not sufficient to entitle the client to demand the papers ; but *semble* also that, if the solicitor's withholding a document would occasion the loss of the property to which it relates, the court will make such an order as, without prejudicing the solicitor's lien, will allow of the documents being made available for the purpose of securing the property.

THE plaintiffs in the cause, who were the surviving executors and trustees of a will, had employed the defendant in the management of part of the testator's real estates, and as their solicitor and agent in the testator's affairs, from the death of the testator in the year 1827, down to the year 1836, at which time there was a long unsettled account pending between themselves and the defendant. About three years afterwards, the defendant brought an action against the plaintiffs to recover a sum which he claimed as the balance due to him on that account : whereupon the plaintiffs filed this bill, praying that an account might be taken of the sums of money received and paid by the defendant as their agent and solicitor, and that, \*upon [\*80] payment by them to the defendant of what, if any thing, should be found due to him upon the taking of such account, the defendant might be ordered to deliver over to them all papers and writings in his hands relating to the real or personal estate of the testator, and that, in the mean time, he might be restrained from proceeding in the action.

The defendant, in his answer, set forth a statement of his accounts, from which it appeared that there was due to him from the plaintiffs the sum of 512*l.* 7*s.* 2*d.* It further appeared from the answer, that certain documents therein mentioned, relating to the testator's estate, and, amongst others, three policies of assurance on lives, which had come to the hands of the defendant in his character of solicitor and agent to the plaintiffs, were still in his possession ; and he admitted that, on being applied to by the plaintiffs, shortly before the commencement of the action, for his accounts, he had refused to produce the account of his receipts until the account of his payments and his claims for remuneration should have been discussed and disposed of ; in justification of which refusal he alleged, that the plaintiffs had applied for his accounts with a view to take proceedings against him, in which an unfair use might be made of his admissions.

In the month of February, 1830, an injunction was granted, on payment of the sum of 512*l.* 7*s.* 2*d.* into court.

In the month of March following, the life, on which one of the policies was effected, dropped, and it being necessary, for the purpose of obtaining payment of the money due upon the policy, to produce it at the insurance office, the plaintiffs applied to the defendant to \*deliver up to them that and [\*81] the other two policies mentioned in the schedule to his answer, sug-

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 1841.—*Richards v. Platel*.
 

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gesting that, as the amount claimed by him had been paid into court, it was no longer necessary for his security that he should retain them. On that application being refused, the plaintiffs presented a petition at the Rolls, praying that the defendant might be ordered within one week to deliver up to them the three policies of insurance.

The Master of the Rolls having made an order in the terms of the prayer of the plaintiff's petition, the defendant presented an appeal petition to the Lord Chancellor praying for the discharge of that order; but before it came on to be heard, the plaintiffs had, under the order, obtained possession of the three policies, and had received the money upon that which had fallen due.

The petition now came on to be heard.

Mr. *Bethell* and Mr. *Anderdon* for the petitioner.—The order of the Master of the Rolls is, in effect, a decree made upon petition: the object of the suit being to obtain possession of these documents under the decree, and then only on payment to the defendant himself of what should be found due to him. So that the order, in fact, gives the plaintiff more than he asks by the prayer of his bill. A mortgagor cannot, upon mere payment of the debt into court, call for a reconveyance of the estate: *Postlethwaite v. Blythe*.<sup>(a)</sup> And the circumstance that a solicitor's lien gives him no interest in the thing itself upon which he can sue, but only a right to retain it until the debt is satisfied, makes his case stronger, if any thing, than that of a mortgagee, \*inasmuch as it furnishes an additional reason why the court should protect him against being prejudiced in his security by any adverse proceedings.

Mr. *Wigram* and Mr. *Tennant*, for the respondents.—This order is not within the principle of the rule against making a decree upon motion. It involves no declaration of adverse rights, for it is not pretended that these policies are not the property of the executors: and it has been decided, that though the mortgagee may insist upon actual payment before he gives up his security, a solicitor cannot retain his client's papers after an ample indemnity has been offered. *Mills v. Finlay*.<sup>(b)</sup> Though it may, perhaps, be doubted whether that case does not go too far, inasmuch as there was there a special contract for security, yet it is a clear authority to the extent of the principle now contended for. This is a still stronger case; a solicitor holding his client at arm's length, and refusing to say what he has received, until the client has agreed to his charges. As to one of these policies at least, there is that pressing necessity for its production, which brings it within the exception adverted to by Lord Eldon in *Clutton v. Pardon*.<sup>(c)</sup>

Mr. *Bethell*, in reply.—The judgment in *Mills v. Finlay* cannot be supported, for, besides the conclusive objection to it created by the existence of

<sup>(a)</sup> 2 Swan. 256.

<sup>(b)</sup> 1 Beav. 560.

<sup>(c)</sup> Turn. & Russ. 301; see p. 304.



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 1841.—*Richards v. Platel*.
 

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the special contract for security, it is inconsistent with Lord Eldon's view of the rights of a discharged solicitor, as stated in *Lord v. Wormleighton*.<sup>(a)</sup>

THE LORD CHANCELLOR:—I cannot see how there can be any sound distinction, on this point, between the case of a solicitor claiming a \*lien on the papers of his client, and the case of any other creditor [\*83] who holds a security for his debt. It was suggested, at the bar, with reference to the case of *Mills v. Finlay*, that the existence of a special contract could make a difference; but there is, in fact, no ground for such a distinction. Liens, existing by the custom of trade or the practice of a profession, are equivalent to contracts; and I know of no distinction, in the law of lien, between that of a solicitor and that of any other party. In the passage which has been cited from Lord Eldon's judgment in *Clutton v. Pardon*, it is perhaps difficult to see exactly what is meant by the words "pressing necessity." But in *Postlethwaite v. Blythe*, he states the principle more generally:—"I take it," he says, "to be contrary to the whole course of proceeding in this court, to compel a creditor to part with his security till he has received his money. Nothing but consent can authorize me to take the estate from the plaintiff before payment." That was the case of a mortgage, but the rule applies equally to the case before me.

It may, doubtless, be a great inconvenience and hardship on the client to be kept out of possession of his documents till the balance of the account be ascertained: and this seems to be a case in which there ought to be no objection, on the part of the defendant, to deliver up the documents, on an ample security for his demand being brought into court. But, nevertheless as a matter of right, I cannot refuse to discharge this order.

There was certainly, as to one of these policies, a pressing necessity for its being delivered up, in order to obtain payment of the money due upon it; and, in such a case, it would undoubtedly be the duty of the court to take care that the solicitor's lien should not \*occasion the loss of the pro- [\*84] perty. But that might have been provided for, by ordering that policy only to be delivered up, for the purpose of obtaining payment, and by directing that the proceeds of it, when received, should be paid into court. It is, however, stated at the bar, that the money on that policy has been actually received by the plaintiffs, and that they are now in possession of the other two; and the question is, what, under these circumstances, is to be done; because my discharging the order, which is all that is asked by the petition, will not bring the money or the policies back, though it might serve as a foundation for a further proceeding. Mr. Wigram's clients paying a further sum of money into court would probably render any further application unnecessary. At all events, all that I can at present do is to discharge the order appealed from.[1]

(a) Jacob, 580.

[1] *Heslop v. Metcalfe*, 3 Myl. & Cr. 183, 190, n. 1; *Stedman v. Webb*, 4 Myl. & Cr. 346; *Boxon v. Bolland*, id. 354, 360, n. 2; *The Mohawk Bank v. Burrows*, 6 Johns. Ch. Rep. 317;

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1841.—*Richards v. Platel*.

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To prevent the necessity for a further application, it was arranged, with the leave of the court, that the cause should be speedily brought to a hearing.

*Hall v. Laver*, 1 Hare, 571, 577 ; Jac. 583, n. 1. A solicitor in a suit, who had been discharged by his client, but who had not delivered his bill of costs within the proper time, was, under the circumstances of the case, ordered to deliver the papers and documents in his possession relating to the suit (without prejudice to his lien) to the new solicitor. Knight Bruce, V. C., "Without questioning any of the authorities which have been cited, but assuming the right of the solicitor to his lien to be equivalent to a right by contract, and to be protected by law, it is also part of that law and of the contract, that the solicitor should be ready within a month with his bill of costs. Both are parts of the same law or contract, the law assuming, in the abstract, a month to be sufficient time for the delivery of a bill of costs. It may be, that in particular cases, further time may reasonably be required. If so, the client ought not to suffer, &c." *Cooper v. Hewson*, 2 Yo. & Coll. C. C. 515. In a late case in the Irish Court of Chancery relative to a solicitor's lien on his client's deeds, the discussion turned very much upon the assumed analogy between such lien, and an equitable mortgage, by a deposit of the muniments of title ; and it was held, that the lien of a solicitor upon the deeds of his client's estate, cannot prevail against a judgment, or for any greater amount of costs than those incurred at the rendition of the judgment. Sugden, Ch., "A good deal of the difficulty arises from the nature of a solicitor's lien, and on its being merely a right to withhold the papers from his client, and not a right to enforce his claim against him ; this renders it unlike a lien arising in the case of a contract. It is quite settled, that the right of lien is as against the client and his heirs and executors, and other representatives, general, and though the papers may come into the solicitor's hands in different particular transactions, he has a lien for the general balance due ; it is also quite clear, that a prior incumbrancer can never be affected by this lien ; the solicitor has a lien on the deeds which belong to his client, but if they did not belong to his client when they came into his possession, he can have no right to them, when his client had none ; and in no case can he have a greater right, and he takes them subject to the same liability as to ownership. So far all is clear, but it becomes very doubtful how far these rules are to work when a case of this sort arises ; persons entitled to a prior claim to the deeds may enforce it and compel their production, as the solicitor has no right to retain them against prior incumbrancers ; if then in consequence of the exercise of this right, a third person becomes incidentally benefitted, whether it is possible to take from this third person the incidental benefit thus obtained ? The right is to withhold possession of the deeds, and to lock them up until the claim is satisfied ; if then a superior claimant says to the solicitor, you cannot lock up these papers against me, and therefore open your box and bring them out—the privilege is lost ; it was to withhold the deeds from the sight of any one, but some one else is entitled to the thing. I am afraid it will turn out in principle, that if an incidental right arise to a third party from such compulsory production, the party producing must relinquish all lien, and that to hold otherwise would be treating the right of lien as an incumbrance, which it is not." At a subsequent day, on making the final disposition of the cause, the Chancellor said ; "Two questions were argued in this case—first, whether the plaintiff, a prior incumbrancer, and having a right to the deeds prior to the solicitor's lien, having obtained production of the deeds, has destroyed the lien—secondly, whether if this be not so, the judgment creditor has a right to the deeds as against the solicitor, on paying of the sums due to the solicitor on the entering up of the judgment. These questions led to the discussion of the general nature of lien. This, as between the solicitor and client, is a very general right ; it may indeed be waived by taking a different security, or he may lose his lien by proving under a commission, or by concurring in a sale under an execution at his own suit. A solicitor's lien is very distinguishable from a mortgage, for though a solicitor cannot have a legal mortgage for future costs, yet he may acquire by lien a security for costs incurred subsequently to the deposit of the deeds. If he expressly contract for a security for future costs, by a pledge of the deeds by way of equitable mortgage, the transaction could not be supported, while the deposit of those very deeds would give a lien for those costs. It requires a strong case, as Lord Eldon says, in the passage referred to by Lord Cottenham, in *Richards v. Platel*, to take deeds away from a solicitor, but I cannot

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 1840. —Barnard v. Wallis.
 

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*Dec. 19.*—Mr. *Anderdon*, on a previous day, stated to the court that, upon the above mentioned appeal petition being left with the Lord Chancellor's secretary, for the purpose of being answered, it had been suggested that it fell within the meaning of the 42d order of April, 1828, relative to the deposit payable on presenting petitions of re-hearing. And he therefore asked that it might be answered as an original petition, without requiring a deposit; to which the Lord Chancellor assented, observing, that a petition to discharge an interlocutory order made on petition at the Rolls, was like the renewal of a motion—it was a fresh petition, and not a petition of appeal.

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*\*Between* EDWARD GEORGE BARNARD, EDWARD BLOUNT, JOHN [\*85] WRIGHT, JOHN FAIRWEATHER HARRISON, WILLIAM HARRISON, THOMAS BARNARD, and Another, on Behalf of themselves and all other the Members of THE STANHOPE AND TYNE RAILWAY COMPANY, Plaintiffs; and WILLIAM WALLIS AND MARIA HIS WIFE, and their Children, Defendants.

1840: November 14, 16.

Where parties, in possession of an easement, filed a bill to restrain the owner of the land from proceeding with an action of trespass, alleging three grounds of defence to the action, two of which were legal, and one equitable, this court allowed the action to proceed to judgment, inasmuch as if the legal grounds of defence should be sustained, the interposition of this court would be unnecessary, and if they should not be sustained, and it should therefore become necessary to entertain the equitable question, this court would know what amount of damages a jury had assessed as a compensation for the easement, and be enabled to secure that amount until the hearing of the cause.

THE bill in this cause sought to restrain the defendant, William Wallis, who was a proprietor of a piece of land over which the Stanhope and Tyne Railway had been constructed, from proceeding in an action of trespass which he had commenced against the plaintiffs, John Fairweather Harrison, Thomas Barnard, and William Harrison, under the following circumstances.

say that the court has not jurisdiction to require production of the deeds upon the money being paid into court. But as a general rule, the solicitor's right is protective only, to withhold production of the deeds until he has been paid, and it cannot be enforced by bill or otherwise. All those points were fully argued here, but they are only important so far as they illustrate the question before us. The contest here is between the solicitor and a judgment creditor. The latter did not require the deeds, and did not ask the aid of the court to obtain their production; they were taken from the solicitor at the instance of the plaintiff, and for the purposes of the plaintiff's suit; and as I stated when this case was before me last, if there was nothing more than this, I think the creditor would reap the full benefit of the production obtained by the plaintiff, without satisfying the solicitor's demand" *Blunden v. Dasart*, 2 Conn. & Law. 111, 119, 124; reversing the decision of the Master of the Rolls in *S. C. Flan. & Kel.* 572. The opinion however, of Sir Michael O'Loughlen, M. R., contains some valuable remarks upon the general topic. *Ibid.* 532, *et seq.*

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1840.—Barnard v. Wallis.

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The piece of land in question formed part of a leasehold estate held under the dean and chapter of Durham, and which was, on and before the 20th of July, 1831, vested in the defendants William Wallis and Maria his wife, under the will of her father, upon trust for the separate use of Maria Wallis for her life, with remainder to their children. By an indenture of that date, the

dean and chapter granted to William and Maria Wallis a renewed [\*86] lease of the premises for twenty-one \*years, subject to a reservation

in the following words:—"Excepting thereout to the said dean and chapter, their successors, grantees, or assigns, all mines, quarries, and seams of clay within and under the said land, with full and free authority and power to dig, work, and carry away the said mines, quarries, and seams of clay; with free ingress, egress, and regress, way-leave, and passage to and from the same, or to or from any other mines, quarries, and seams of clay, lands, and grounds, on foot and on horseback, and with carts and all manner of carriages; and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever for the purposes aforesaid, and particularly of laying, making, and granting waggon way or waggon ways in and over the demised lands, or any part thereof (paying reasonable damages for spoil of ground to be thereby done, upon the adjudication of two indifferent persons to be chosen by the parties.)"

Subsequently to the renewal of the lease, the Stanhope and Tyne Railway Company entered upon the piece of land in question, and made a railway over it, which they used for the carriage of passengers and for general purposes, alleging, as their authority for so doing, a license, by indenture dated the 13th of October, 1833, from the dean and chapter to the plaintiffs John Fairweather Harrison, Thomas Barnard and William Harrison, and their assigns, which was afterwards assigned to the plaintiffs Edward George Barnard, Edward Blount, and John Wright, as trustees for the company. At that time the piece of land was in the occupation of an under-tenant, to whom the company paid a certain annual sum, pursuant to the condition contained in the reservation, for damage done to his field by the construction of the

railway over it, and they offered to continue the like payment to Wal- [\*87] lis after the under-lease \*should have expired; but Wallis contended

that the reservation in the lease did not authorize the dean and chapter to make or to empower others to make a railway for the conveyance of passengers and for general purposes; and he insisted, on that ground, that he was entitled to be paid an additional sum of money in consideration of the extra profits derived by the company from the use of a railway of that description; and for the purpose of enforcing that claim, he brought an action, in the month of March, 1838, against J. F. Harrison, Thomas Barnard and William Harrison, for injury to his reversion. The defendants in that action pleaded, amongst other pleas, that the trespasses in question were committed with the leave and license of Wallis. The jury, however, returned a verdict for the plaintiff, and assessed the damages at 127*l.*

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 1840.—*Barnard v. Wallis*.
 

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On the 7th of November, 1839, the under-lease having expired, Wallis brought a fresh action of trespass against the same parties, on the same grounds; and similar pleas having been put in, the bill in this cause was filed, insisting, first, that the reservation in the lease of the 20th of July, 1831, empowered the dean and chapter to grant the plaintiffs a license to make a railway for general purposes; and that such license had in fact been granted by the indenture of the 13th of October, 1833: secondly, that at all events, Wallis had, by contract with the plaintiffs, expressly authorized them to make such a railway: and, thirdly, that he had, by acquiescence, deprived himself of any right, which he might otherwise have had, to complain of it.

The common injunction having issued, and having been extended to stay trial, the defendants put in their answer, and thereupon obtained an order *nisi* to dissolve \*the injunction; but the plaintiff having shown [\*88] cause, on the merits, before the Master of the Rolls, his lordship, on the 3d of August, 1840, made an order continuing the injunction until the hearing of the cause.

The defendants now moved that the order of the Master of the Rolls might be discharged, and that the injunction might be dissolved.

Mr. *Stuart*, Mr. *Faber*, and Mr. *W. H. Watson*, appeared in support of the motion.

Mr. *Wigram*, Mr. *Turner*, and Mr. *Piggott*, *contra*.

On the point of acquiescence, the following cases were cited:—*Stiles v. Cowper*,(a) *Bowes v. East London Water Works Company*,(b) *Jackson v. Cator*,(c) *Pilling v. Armitage*,(d) *Hobbs v. Norton*,(e) *Edlin v. Battaly*,(g) *Hanning v. Ferrers*.(h)

THE LORD CHANCELLOR:—The injunction, as it stands, prevents the plaintiff at law from proceeding with his action, and therefore ties up his alleged claim until this cause shall be heard; the effect of which will be, that, if the plaintiffs in equity should not succeed at the hearing, the plaintiff at law will then have to seek his remedy. At what interval of time that hearing will take place, if at all, and from whom the plaintiff at law will then have to recover anything he may be entitled to,—are matters extremely uncertain, and, therefore, very dangerous to speculate upon.

\*The matter in contest between the parties depends upon three [\*89] questions, two of which are questions at law; but the third, which can only be raised, for any purpose, in the event of the questions at law being decided in a certain way, is, undoubtedly, a question for this court, and this court only.

The defendants at law say the plaintiff at law has no right against them, because the license they have obtained from the dean and chapter entitles

(a) 3 Atk. 692.

(d) 12 Ves. 78, see p. 85.

(h) Ibid. pl. 10.

(b) Jac. 324.

(e) 1 Eq. Ca. Abr. 356, pl. 8.

(c) 5 Ves. 688.

(g) Ibid. pl. 9.



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1840.—Barnard v. Wallis.

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them to do all they have done or intend to do : that is a question purely at law : and if the company are right on that point, there is no other question between the parties.

The defendants at law then say, if the license of the dean and chapter does not go to the extent they suppose, still the plaintiff at law has, by contract with them, permitted them to do what they have done and propose to do ; that is, has given them leave and license. That is also a question which is raised in the action now pending, and which, if proved by the defendants at law, puts an end to the contest.

A third question remains, which can only arise in the event of the plaintiffs in equity failing in both the other points ; namely, that though they have no right under the license from the dean and chapter, and although the plaintiff at law has never given to them, by contract, leave and license, yet that he, with the knowledge of what their objects were, has so conducted himself as to raise an equitable bar against the assertion of his legal right. That is a question for a court of equity, and depends on a variety of circumstances, which may or may not be established in this cause. It is quite obvious that

it may turn very much upon how far the party now insisting upon [\*90] his legal right knew of that legal right, and that the plaintiffs in equity were invading it ; and it would be very hazardous to dispose of such a question upon an interlocutory application.[1]

I apprehend however, that it is the course of the court, where the question depends partly on a legal title and partly on an equity, which will arise only in the event of that title being decided in one way, either to require that the party applying to the court for its interposition, should admit the legal right of the other party, as in the case of giving judgment in ejectment, which is the common instance, or, if circumstances are not such as to enable him to do that, then to allow the action to go on, in order that the legal rights of the parties may be first ascertained, and that he may then come to this court to apply those legal rights. This I apprehend to be the regular course of proceeding ; and it is a very wholesome practice. It occasions no loss of time ; and it has, moreover, this good effect, in a case like the present, where the plaintiff in equity is in possession of the easement in dispute, that if the parties come back to this court after the trial at law, I shall then know what amount of damages has been assessed, and shall have an opportunity of securing in court that which at law shall have been decided to be a full compensation for the easement ; whereas, at present, I have no means of fixing upon any sum to be paid into court.

For the purpose, therefore, of ascertaining what are the legal rights of the parties, and of knowing what it is which is to be the subject of adjudication here, it is clear the action ought to proceed, and ought not only to proceed to verdict, but to judgment ; because there are evidently questions of law

[1] See the next case.



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1841.—Williams v. Earl of Jersey.

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which it will be for the court to decide after the jury shall have done their duty.

"I express no opinion as to the equity ; for it is very likely it will [\*91] never be necessary to do so ; but to prevent my order from being quoted as an expression of opinion, it had better stand thus :—Discharge the order so far as it prevents the defendant from proceeding to judgment at law, and direct the rest of the motion to stand over until after that judgment has been pronounced.[2]

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The order, as drawn up, discharged the Master of the Rolls' order of the 3d of August, so far as it restrained the defendant Wallis from proceeding to judgment in the action, and directed that the present motion should stand over until after that judgment should have been obtained, with liberty to all parties to apply.

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### WILLIAMS and Others v. THE EARL OF JERSEY.

1841: January 18.

A party may so encourage another in the erection of a nuisance, as to give the adverse party an equity to restrain him from recovering damages at law for such nuisance when completed.

In a bill filed for that purpose, a general allegation, that the defendant encouraged the erection of the nuisance while it was in progress, is sufficient to let in evidence of such particular acts of encouragement as will sustain the equity, and consequently is sufficient to prevent a demurrer.

What degree of encouragement or what circumstance, leading to encouragement, would be sufficient for that purpose ; *Quære*.

THIS was an appeal from an order of the Vice-Chancellor allowing a general demurrer to a bill filed by the plaintiffs, praying that they might be quieted in the use and enjoyment of certain copper works in the neighborhood of Swansea, and that the defendant might be restrained from prosecuting an action against them for an alleged damage to his lands occasioned by the works.

The scope of the bill comprehended three sets of copper works, called respectively the Rose Works, the \*Landore Works, and the [\*92] Morfa Works, all of which were in the occupation of the plaintiffs, and were the subject of the action at law. As to the two first, the case stated by the bill was one of acquiescence only ; and as the decision turned exclusively upon the Morfa Works, the circumstances of which were different, it will be sufficient to state the substance of the bill with reference to the latter works only.

As to those works, the case made by the bill was as follows :—The piece

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[2] *Carroll v. Sand*, 10 Paige, 298 ; *Mackintosh v. Wyatt*, 3 Hare, 562 ; *Bacon v. Jones*, 4 Myl. & Cr. 433, 439 ; *Rawson v. Samuel*, post, 168, et seq.

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 1841.—Williams v. Earl of Jersey.
 

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of land on which the works were erected was situated on the right bank of the river Tawe, and in the year 1810 formed part of the Britton Ferry estate, the bulk of which lay on the opposite bank of that river, and which was then settled to the use of Lord Vernon for life, with remainder to the use of Villiers Mansell, in fee. The Duke of Beaufort was at the same time the owner of a piece of land on the left bank of the river, which lay intermixed with lands belonging to the Britton Ferry estate. In the year 1810 the Duke of Beaufort made an exchange with Lord Vernon and Villiers Mansell of the latter of these two pieces of land for the former, the avowed object of the Duke in such exchange (as was recited in the instruments by which it was carried into effect) being to erect copper works on the piece of land which he was to take on the right bank of the river, as being a convenient spot for that purpose. In the year 1813 Lord Vernon died, whereupon Villiers Mansell came into possession of the Britton Ferry estate, including the piece of land so taken in exchange from the Duke of Beaufort; and in the year 1814, Villiers Mansell also died having devised that estate to the defendant.

In the mean time, and shortly after the completion of the above [\*93] mentioned exchange, the Duke of Beaufort \*demised part of the piece of land so taken by him to one Vivian, who, in the years 1810 and 1811, erected extensive copper works thereon, and had ever since used the same without interruption or disturbance. The remainder of the same piece of land was not so applied until the year 1829, when the plaintiffs, having obtained a lease of it from the Duke of Beaufort, erected on it, by his authority, the copper works in question, called the Morfa Works.

After stating to the effect above mentioned, the bill alleged that, during the erection of the last mentioned works the defendant well knew or was aware of their being erected and made with a view to the smelting and manufacture of copper, and that he was also well aware of the deleterious effect on vegetation produced by such manufacture; but that he nevertheless allowed the plaintiffs to proceed in the erection of the works, and to expend large sums of money in completing and finishing them, and in furnishing them with the requisite machinery and plant, without making any objection thereto, and that he acquiesced in and encouraged the erection of such works and the expenditure of the plaintiffs upon or with respect to the same. The bill further alleged that ever since those works had been built and completed, the smelting and manufacture of copper had been carried on therein without any interruption or disturbance, and without any complaint on the part of the defendant until the action at law was brought.

The bill then contained numerous charges tending to show that for a century past the defendant and his predecessors in title and estate had erected, or sanctioned the erection of, copper works upon various parts of the Britton Ferry estate itself; but which charges it is [\*94] not material to state with reference to the point upon which alone the case was decided.

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1840.—Williams v. Earl of Jersey.

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The appeal now came on to be heard.

Mr. *Wigram* and Mr. *Tennant*, in support of the demurrer.—If the case stated by the bill constitute any defence at all to the action, it is a legal and not an equitable one: for no degree of acquiescence will give an equity, unless it amount to leave and license; and then it may be pleaded at law. The plaintiffs themselves do not venture to allege that they have not a legal defence: and that circumstance alone is a sufficient ground for a demurrer. *Edwards v. Edwards*.(a) It is true, there are cases, as for instance that of *Lord Cawdor v. Lewis*,(b) in which this court has restrained a party from asserting a legal right, on the ground of his having permitted another person to expend money upon an object inconsistent with such right: but that principle only applies where there is some privity between the parties, as for instance, that of landlord and tenant or principal and agent, and not where, as in this case, the parties are strangers to each other. If it should be said that the defendant is precluded from asserting his legal right, by the recital in the deeds of exchange, that the duke's object in the exchange was to erect copper works on the land, the answer is that such a recital could, at the most, only bind the parties to those deeds, and that it cannot operate as a covenant running with the land so as to bind all persons claiming under them.

Mr. *Jacob*, Mr. *Bethell*, and Mr. *Lloyd*, in support of the bill.—\*In [95] *Edwards v. Edwards*, the bill alleged that the execution of the power under which the plaintiff claimed was good at law, but that if it were not, the defect was such as equity would supply. And the demurrer was allowed on the ground, that if, as the bill alleged, the plaintiff had a good title at law, it necessarily followed that he had no case in equity, whereas here, if the plaintiffs have a good title at law, *a fortiori* they have a case for relief in this court; for they ask, by their bill, not merely to restrain the action, but to be quieted in the right which they now enjoy: and for that purpose long undisturbed possession supersedes the necessity of establishing the right by an action at law.(c) But, independently of that head of relief, the allegation that the defendant acquiesced in and encouraged the erection of the works is sufficient to sustain the bill, considered as a bill for an injunction only: for the principle adverted to on the other side with respect to acquiescence applies equally although the parties be strangers to each other. *Case of the Water-course*;(d) *Short v. Taylor*.(e)

Mr. *Wigram* in reply.—Admitting that encouragement might, in some cases, give an equity, the allegation in this bill is too general. For the language of pleading must be taken most strongly against the party using it

(a) Jac. 335.

(b) 1 Y. &amp; Coll. 427.

(c) Redesd. Plead. 146.

(d) 2 Eq. Ca. Abr. 522, pl. 3.

(e) Ibid

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(*Attorney General v. Mayor of Norwich* ;(a) and the encouragement may turn out to be such as would give the plaintiffs no equity.

[\*96] \*Jan. 18.—THE LORD CHANCELLOR :—In this case, it is not necessary for me to observe on any other parts of the bill except that which relates to the Morfa works. There are two grounds upon which it is alleged that the demurrer must be overruled. The first is, what is stated as to the purpose for which the exchange of the lands took place. It is said that when the exchange took place, those who claim the estate now possessed by Lord Jersey were aware that the object of the Duke of Beaufort in that transaction was to erect copper works upon the piece of land which he was to take by the exchange. I do not think it necessary to give any opinion as to that part of the case. If it were necessary, it would be important to consider the doctrine upon which I acted in the case of *Squire v. Campbell* ;(b) but I do not pursue that inquiry, because there are other parts of the case which I think quite sufficient for the purpose of disposing of the present question.

It was then alleged that there was sufficient in what the bill states to have been the conduct of Lord Jersey with respect to these works, to preclude him from the right of treating them as a nuisance. The allegation in the bill is that, whilst the erection of these works was in progress, he was aware of it, and that he encouraged it. Of course it must be assumed, on a demurrer, that what the bill alleges is true, and the only question is, whether, if the facts were established as they are alleged, a case exists in which the plaintiff is entitled to the interposition which he prays. Now, there certainly are cases in which a party, having an equity, loses that equity, as against another person, by permitting him to go on dealing with property in ignorance of such equity.[3] In the case of *Jones v. The Royal Canal Com-*

[\*97] *pany* ;(c) \*Lord Manners went to this extent. He held that it was the duty of a party, seeing a nuisance in progress, to give notice, to the party erecting the nuisance, of his intention to object. It is unnecessary to say under what circumstances a party might be affected by that course of conduct, but certainly it is a recognition by Lord Manners that such a case might exist. There is a very short note of the decision, but, assuming the note accurately to state what Lord Manners said, it shows a case in which a party would be precluded, by an omission to give notice, from asserting an equity. Certainly it is a different question whether such an omission would give the adverse party an equity to prevent the party, concealing his right,

(a) 2 Mylne & Craig, 406 ; and see Wigram's Points in the Law of Discovery, p. 124, *et seq.*, where the authorities on this point are collected. That class of cases was not adverted to in the argument.

(b) 1 Mylne & Craig, 459.

(c) 2 Molloy, 319.

[3] *Nicholson v. Hooper*, 4 Myl. & Cr. 179, 186, and n. 1, *ibid.* and cases there cited. *Gerard v. O'Reilly*, 2 Conn. & Law. 165.

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 1841.—M'Neil v. Garratt.
 

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or apparently acquiescing in the nuisance, from asserting his title at law to compensation for the nuisance when effected. But there are two cases in which that has been done : I mean the case of the Watercourse, and that of *Short v. Taylor*, both reported in 2 Equity Cases Abridged, 522, where injunctions were granted to stay actions for nuisances, because the plaintiff at law had encouraged them. That is the term used by the court. I think it is impossible, after those two cases, to say that a party may not so encourage that which he afterwards complains of as a nuisance, as not only to preclude him from complaining of it in this court, but to give the adverse party a right to the interposition of this court in the event of his complaining of the nuisance at law.

That being the state of the authorities, if I were to allow this demurrer, I should of course be understood as saying, and I should in fact be saying, that no case was stated on this bill which, if proved, would entitle the plaintiff to the interposition of the court. There is no fact before me to call for any opinion as to what degree of encouragement, or what circumstances leading to encouragement, would be sufficient for that purpose. [\*98] But I think it quite clear that there is in this bill sufficient allegation to make it competent for the plaintiff to give such evidence as would operate in raising an equity against the title asserted by a party claiming compensation at law for a nuisance.

For these reasons, I think the demurrer must be overruled. I can by no means say that it is a very clear case, for there is as little allegation in support of the equity as can well be conceived. A very general term is used. My judgment proceeds on this ; that a term is used which would enable the party to make a case which if proved would entitle him to the interposition of the court. I must affirm the Vice-Chancellor's order with costs.

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 M'NEIL v. GARRATT.

1841 : January 29.

A party who has notice of an order of court is bound by it from the time the order is pronounced, and if the order be for an injunction, and the party after notice be guilty of a breach of it, he may be committed for the contempt without the production of the writ of injunction, and although the writ have not actually issued.

THE defendant was in custody for breach of an injunction committed by him after he had received notice that the order for the injunction had been made, but before it was drawn up.

Mr. *Cooke* now moved for his discharge, on the ground that the order for his commitment had been made without the production of the writ of injunction, which, it appeared, did not issue until a fortnight afterwards.

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 1841.—Norcutt v. Dodd.
 

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[\*99] \*In support of the motion *Ellerton v. Thirsk*(a) was cited, in which Lord Eldon was reported to have said, that a motion to commit a party for breach of an injunction could not be made without producing the writ.

Mr. *Stuart* and Mr. *Willcock* appeared for the plaintiff; but

THE LORD CHANCELLOR (without hearing them) said,—It is the established rule of the court, that a party who has noticed of an order is bound by it from the time it is pronounced: and if he presumes to disobey it, he is liable to the censure of the court for so doing. But now it is said that the court cannot punish the party for disobedience till after the writ has issued; and Lord Eldon's authority is cited for that proposition. I cannot suppose that Lord Eldon ever laid down any such rule. The writ bears date when the order is passed. If, therefore, the proposition were correct, a party would have all the interval between the making and the passing of the order, to commit the act which the injunction is intended to restrain.

Motion refused with costs.[1]

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[\*100]

\*NORCUTT v. DODD.

1841: January 29.

A voluntary alienation of property by a party who, at the time of such alienation, was insolvent, may be set aside in a suit by his assignees subsequently appointed under the insolvent debtors' act, although the subject of such alienation be a chose in action.

THIS suit was instituted by the assignee, under the insolvent debtors' act, of Robert Torre, one of the defendants, for the purpose of setting aside a voluntary assignment of an annuity to which he was entitled under his marriage settlement.

By the settlement, which bore date the 12th of April, 1832, and was made between Elizabeth Dodd the intended wife of the first part; Robert Torre of the second part; William Dodd, the father of Elizabeth Dodd, of the third part; and Henry Le Keux and another person, as trustees, of the fourth part, William Dodd covenanted with Robert Torre, that in case the marriage should take effect, he, William Dodd, would, during the joint lives of himself and his daughter, pay to Robert Torre, or his assigns, the yearly sum 50*l.*, as therein mentioned.

The marriage was solemnized on the 13th of April, 1832.

On the 17th of November, 1836, the plaintiff recovered judgment against

(a) 2 J. & W. 376.

[1] A person who was in court, when an order for an injunction and receiver was granted, told the parties against whom it was granted, of it. It was held that they were in contempt for disobedience, although the order was not entered, nor the process served. *Hull v. Thomas*, 3 Edw. Ch. Rep. 236; and see *St. John's College v. Carter*, 4 Myl. & Cr. 497.



1841.—*Norcutt v. Dodd.*

Robert Torre, in an action of debt, for the sum of 70*l.* and costs ; but at the request of Robert Torre, who stated that he expected to receive some money on the 19th of November, which would enable him to satisfy the plaintiff's debt, execution was delayed until that day. On the 19th of November, Robert Torre having again made default in payment, the plaintiff sued out a writ of execution ; but the sheriff's officer, on coming to Robert Torre's house for the \*purpose of executing the writ, found another [\*101] officer in possession of his goods, under a similar writ, at the suit of one Mottram, to whom Robert Torre had executed a warrant of attorney the day before, to enter up judgment against him for the sum 72*l.* 10*s.* On the 22d of November, a third writ was lodged with the officer so in possession of the goods, at the suit of one Perring, for 70*l.* The officer continued in possession until the 2d of January, when the goods were sold by auction, and the net proceeds of the sale were not sufficient for the satisfaction of Mottram's debt.

On the 22d of December, 1836, Robert Torre executed a deed, by which he assigned the annuity to Henry Le Keux, in trust for the separate use of his wife ; and in the month of May, 1837, he surrendered himself to prison, and was subsequently discharged under the insolvent debtors' act, after six months confinement ; and the plaintiff was duly chosen the assignee of his estate and effects.

The bill was filed against William Dodd, Henry Le Keux, and Robert Torre and Elizabeth his wife ; and it prayed that the assignment might be declared fraudulent and void against the plaintiff and the other creditors of the insolvent ; that an account might be taken of what was due to the plaintiff for the arrears of the annuity, and that William Dodd and Henry Le Keux might be decreed to pay to the plaintiff what should be found due from them respectively on account thereof, together with the costs of the suit.

The cause now came on to be heard before the Lord Chancellor.

Mr. *Wakefield* and Mr. *Kenyon Parker*, for the plaintiff, contended that the assignment was void under \*the 13 Eliz. c. 5 ; *Taylor* [\*102] *v. Jones* ;(a) and that, at all events, the circumstances of the transaction showed it to be so fraudulent on the creditors, that the court, according to its general principles, would not allow it to stand.

Mr. *Rogers*, for Elizabeth Torre, argued that the stat. of 13 Eliz. did not apply to choses in action ; *Dundas v. Dutens*,(b) *Ridder v. Kidder* ;(c) and that as the insolvent debtors' act(d) had made no provision for setting aside voluntary alienations of property, the plaintiff had not shown by his bill any title upon which the suit could be sustained.

Mr. *Martindale* appeared for Robert Torre.

(a) 2 A tk. 600.

(b) 1 Ves. jun. 196.

(c) 10 Ves. 360.

(d) 7 G. 4, c. 57.

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Mr. *Norton* appeared for William Dodd and Henry Le Keux, who submitted, by their answer, to act as the court should direct.

THE LORD CHANCELLOR:—This being an assignment of a chose in action, and the debtor being still living, the transaction is not fraudulent under the statute of Eliz. alone; but under that statute, taken in connection with the insolvent debtors' act I am of opinion that it is. The difficulty which arose upon the statute of Eliz., with respect to voluntary assignments of choses in action, was, that, during the lifetime of the debtor, creditors could not be said to be prejudiced by them, inasmuch as that species of property was not subject to be taken in execution; but after his death, it was other-

wise, because then the creditors might reach all his personal property [\*103] of whatever kind: and the same reason applies where the debtor has brought himself within the operation of the insolvent debtors' acts; because, under those acts, all his property becomes applicable to the payment of his debts. In the present case, however, there is no conclusive evidence that the debtor was indebted to the extent of insolvency at the time of the assignment, though the fact of their being three executions in his house at the time makes it highly probable. As to that, therefore, there must be an inquiry.(a)

The defendants dispensing with the inquiry, the decree was made in the terms of the prayer, except as to the costs of the suit, which were ordered to be paid by Robert Torre. With respect to the costs of William Dodd and Henry Le Keux, his lordship observed that the former, being made a party to the suit as the covenantor for the payment of the annuity, was clearly entitled to his costs: and that although Henry Le Keux appeared as the trustee under the assignment, and, as such, a party to a fraudulent transaction, yet inasmuch as he was a necessary party to the suit as one of the trustees of the marriage settlement, his lordship thought that he was also entitled to his costs, and that both he and Dodd should be allowed to retain so much of their respective costs as Robert Torre should be unable to pay, out of what was due from them respectively on account of the annuity.[1]

(a) Upon the question whether, in order to avoid a voluntary conveyance, under the act 13 Eliz. c. 5, it is necessary to show that the grantor was, at the date of the conveyance, indebted to the extent of insolvency, see *Lush v. Wilkinson*, 5 Ves. 384; *Richardson v. Smallwood*, Jacob, 552, [ibid. 558, n. 1;] *Shears v. Rogers*, 3 B. & Adol. 362; and *Townsend v. Westcott*, 2 Beav. 340. The last mentioned case seems to show that it is not necessary that the grantor should be so indebted.

[1] As to the right of a trustee defendant to costs, see *Angell v. Davis*, 4 Myl. & Cr. 364; *Bradley v. Amidon*, 10 Paige, 243; *Poole v. Pass*, 1 Beav. 600; *Pride v. Fooks*, 2 Beav. 431; *Holford v. Phipps*, 3 Beav. 434.

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1841.—Taylor v. Rundell.

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**\*TAYLOR v. RUNDELL.**

**[\*104]**

1841: January 20.

A lease of mines was made to four persons, nominally as individuals, but really as trustees for a mining company, reserving to the lessor a certain proportion of the net profits of working the mines. A bill having been filed by the executors of the lessor against the three surviving lessees, who were also shareholders and directors of the company, for an account, the defendants, in their answer to that part of the bill which sought a discovery of the mines that had been opened and worked under the lease, of the moneys expended and received in working them, and of the documents in the possession of the defendants or their agents relating to the matters in question, after stating what they personally knew of the matters inquired after, and setting forth a list of all the documents in the possession of themselves or their agents, proceeded to state that there were other documents in the custody of the agents of the association, but who were not their agents personally, containing all the information that could be obtained about the matters in question, but that the defendants had no power to use those documents except when sitting at the board of directors, or by an order of the board, and that they believed the directors declined to allow them to use the same, or to afford them any information which would assist the plaintiffs in prosecuting the suit until all the other shareholders should have been made parties. Held, this answer was insufficient, by reason of its not stating that the defendants had applied to the board of directors for leave to procure and give the information required, and that they had been refused.

THIS was an appeal from an order of the Vice-Chancellor, by which he had held the answer of the defendants to be insufficient.[1]

The late Duke of York, being entitled, under a grant from the Crown, to certain mines in Nova Scotia, for a long term of years, subject to a reservation of certain rents and royalties, by indenture dated the 12th of September, 1826, demised all the mines comprised in that grant to the defendants and John Bridge, since deceased, by way of under-lease, reserving, in addition to the rents and royalties payable by the Duke of York to the Crown, a certain proportion of the net annual profits to arise from the working of the mines. This under-lease provided, amongst other things, that the lessees should keep, or cause to be kept, such accounts as should be necessary to show the actual gains and profits of the mines, and should give free access and liberty to such person as the Duke of York, his executors, administrators, and assigns, should from time to time appoint, to inspect and take copies thereof; and also that they \*should annually, during the continuance of the [\*105] term thereby granted, lay or cause to be laid before the Duke of York, his executors, administrators, or assigns, or such person as he or they should authorize to receive the same, a full, true, and particular account in writing of the number, names, and situation of the mines respectively, and also the numbers, names, and situations of all the shafts, adits, levels, drains, and other works whatsoever belonging thereto, so as to afford a full, clear, and true statement of the mines respectively, and of the several works thereof; and also that they should appoint or cause to be appointed such person as the Duke of York, his executors, administrators, or assigns should from time

[1] The case before the Vice-Chancellor is reported, 11 Sim. 391.

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1841.—Taylor v. Rundell.

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to time nominate for that purpose, to have the full privileges and powers of a director, and to sit at the board of directors appointed or to be appointed for conducting the affairs of the mining business, for the express purpose of watching over and attending to the interests of the Duke of York; such director to be first approved by the majority of the board of directors for the time being at the next meeting after such appointment.

The object of the bill, which was filed by the executors of the late Duke of York, was to obtain a discovery of the mines which had been opened and worked by virtue of the under-lease, and an account of the moneys which had become due to the plaintiffs in respect of such working.

It appeared, from the answer, that the under-lease, although in terms granted to the defendants individually, was granted to them as trustees for a numerous company called "The General Mining Association," of which the defendants were members, and were three of the directors; and that they [\*106] had never worked or been interested in any mines in Nova Scotia individually, or otherwise than as members and directors of the association.

It also appeared, from the answer, that a Mr. Parkinson was, shortly after the execution of the lease, nominated by the Duke of York, and duly appointed, to act as a director of the association, in pursuance of the stipulation above mentioned, and that he had ever since occupied a seat at the board in that character. It further appeared that it was, by the co-partnership deed of the association, provided, that the board of directors should have the entire control and management of the mines, and that a general meeting of the proprietors should be held in the month of May or June of every year, at which meeting the accounts of the association and the reports of the directors were to be produced, and that from the fourteenth to the thirty-fifth day after the holding of every yearly general meeting, the secretary should permit any of the proprietors to have, at the office of the association in London, free access to all the accounts, books, and other documents belonging to the association, but that no proprietor should be at liberty to examine or inspect such accounts or documents, except during that period.

That portion of the interrogating part of the bill which was the subject of the first exception was as follows:—

That the defendants may answer and set forth, to the best and utmost of their knowledge, information, remembrance, and belief, whether there are not or is not in the possession of the agents or agent of the said defendants, or of one and which of them, and whether or not, more especially [\*107] in America, divers and what, or some and what grants, leases, licenses, copies of grants, leases, licenses, books of account, accounts, papers, and writings relating to the quantity of ores, coals, and other minerals which, since the 12th of September, 1826, have been gotten or disposed of from the said mines, beds, and seams, or to the sum or sums of money received since the 12th of September, 1826, in respect of making, working,

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getting, or disposing of the said mines, metals, minerals, ores, and other substances, or to the charges and expenses attending the same or consequent thereon, or to the gains derived therefrom, or to the grants, licenses, or leases under which any mines, which, since the 12th of September, 1826, have been worked or gotten by the defendants, have been worked or gotten, and at what time the same were first opened.

The portions of the interrogating part of the bill to which the other exceptions referred, sought a particular discovery of what mines had been opened and worked under the lease of September, 1826, what ores or minerals had been gotten therefrom, what moneys had been expended and received in the course of such working, and so forth.

In answer to these portions of the bill the defendants stated that they had in the first schedule to their answer annexed, set forth a full and true list of every document in their own possession or power, and they had in the second schedule set forth, to the best of their respective knowledge and belief, a full and true list of every document in the possession of the secretary of the association in London; but they said that the secretary was not their or either of their agent, but the agent of the association, of which the defendants were shareholders and directors; and that the defendants had not \*nor [\*108] had either of them, to their or either of their knowledge or belief, any agent in America, though they admitted that the association had agents in America; and they said that, except the documents mentioned in the first schedule, they respectively denied that there was in the possession of the agents or agent of them, the defendants, or either of them, either in America or elsewhere, any grant, lease, license, &c.

They said, however, that they believed, not from any positive information, but from the fact of their being agents of the association in America, that the principal agent had in his possession many books of account and other documents relating to the accounts of the mines, and to the working thereof; and that such agent had also in his possession some deeds and licenses relating to the title of the mines, but that, inasmuch as he was in the habit of transmitting monthly to the secretary of the association in London copies of all the accounts and other documents of interest or importance relating to the mines, the defendants believed that the documents mentioned in the second schedule would furnish all the information as to the matters of account, and, as far as they knew or believed, all information of any importance, in reference to any of the matters in question, that could be obtained by an inspection of the documents in the possession of the agent of the association in America; and they said they were wholly unable further to set forth, as to their belief or otherwise, whether or not there was in the possession of any agent of the association in America, or, further than appeared by the second schedule, whether or not there was in the possession of any other agent of the association any grant, lease, &c.

The answer further stated that the defendants, being engaged in exten-



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[\*109] sive mercantile concerns of their own, \*had paid but little attention, to the affairs of the association, and that, save as therein set forth, they had no personal knowledge whatsoever, or other knowledge than was contained in the books and documents mentioned in the schedules of any matters connected with the mines; that in fact the books and documents mentioned in the second schedule were not, nor were any of them in the possession or power of the defendants or either of them, in any other sense than that they and the other directors of the association, including Mr. Parkinson, when assembled as a board, were competent to order the same to be used and inspected by a vote of the board: that they had no authority to make use of those documents, or any of them, as individuals, except only when sitting with the board, or by an order of the board, and except that they, in common with the other proprietors of the association, had a right to inspect the same and take copies thereof during the time limited for that purpose by the provisions of the co-partnership deed: that Mr. Parkinson, as one of the directors, had the same opportunities as they (the defendants) had of inspecting and using the documents, and that they (the defendants) had not permission or authority from the board of directors to have or use them for the purposes of the present suit; on the contrary, they were informed and believed that the directors declined to allow them to use the same, or to give them any further or other information in this suit which might enable the plaintiffs to prosecute the same against them (the defendants,) who were mere trustees, without bringing the other parties interested in the association before the court.

Exceptions for insufficiency having been taken to these parts of the answer, they were disallowed by the master, but exceptions to his report were subsequently \*allowed by the Vice-Chancellor, who considered the answer insufficient; and the defendants now presented a petition of appeal, praying that his honor's order might be discharged, and that the exceptions to the master's report might be overruled.

Mr. *Wakefield*, Mr. *Bethell*, and Mr. *Wood*, in support of the appeal.—The Vice-Chancellor considered this answer insufficient, by reason of its not stating that the defendants had applied to the board of directors for leave to procure and give the information required, and that such application had been refused. The defendants, however, have given to the plaintiffs by the answer, all the information that they could give, without committing a breach of trust towards the other members of the association, whom the plaintiffs have not thought fit to make parties to the bill. It is clear that they could not be compelled to produce documents belonging to the partnership in the absence of any of the partners: *Murray v. Walter*.<sup>(a)</sup> The same principle was recognized by Lord Eldon in *Lambert v. Rogers*,<sup>(b)</sup> where the court refused to order a mortgagee, to produce the deed of his mortgagor, though the deed related to lands of which the plaintiff and the

<sup>(a)</sup> *Infra*, p. 114.<sup>(b)</sup> 2 Mer. 489.



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mortgagor were tenants in common. But it has also been decided that if a party can protect himself from producing a document, he may refuse to answer any question relating to the contents of that document. In *Latimer v. Neate*, (a) your lordship is reported to have said, "a defendant may be bound to state in his answer, and describe the documents: he may be compelled to admit that he has such documents in his possession, but not compellable to state \*their contents, if he is entitled to protect himself by any [\*111] rule which prevents a plaintiff from asking for the production of the documents."

[THE LORD CHANCELLOR :—Between the case there referred to and the present, there is just the difference between a privilege not to produce and an inability to produce.]

At all events, as to the list of the documents, this answer cannot be treated as insufficient without holding that the agents of the association are the agents of the defendants individually, which they positively swear they are not.

Mr. *Knight Bruce*, Mr. *Wigram*, and Mr. *J. Russell* appeared for the respondents; but

THE LORD CHANCELLOR, without hearing them, said—The whole of this argument appears to me to turn upon a supposed analogy, which, in my mind, has no existence.

It is true that the rule of the court, adopted from necessity, with reference to the production of documents, is that if a defendant has a joint possession of a document with somebody else who is not before the court, the court will not order him to produce it, and that for two reasons: one is, that a party will not be ordered to do that which he cannot or may not be able to do: the other is, that another party, not present, has an interest in the document which the court cannot deal with. But that rule does not apply to discovery; in which the only question is, whether, as between the plaintiff and defendant, the plaintiff is entitled to an answer to the question he asks; \*for if he is, the defendant is bound to answer it satisfactorily, or, at [\*112] least to show the court that he has done so as far as his means of information will permit.[2]

(a) 4 Cl. & Finnelly, 570; see p. 584.

[2] One member of a club, on behalf of himself and the rest, sued two other members, to recover back moneys belonging to the club. It having been determined that the other individual members were not necessary parties, it was held that the defendants could not resist the production of documents in their possession, on the ground that the other members had an interest in them: but as it was objected that the plaintiff was an attorney in actions brought against the defendants by different creditors of the club, and that he might use the documents sought to be produced, as evidence of the demands which those creditors had against the club; the Master of the Rolls, Lord Langdale, said; "I think that the plaintiff ought not to use the documents for any such collateral object; and as he has offered, if I should think it right, to undertake not to use the documents, or any copy of them, for that purpose, I shall make the order for the production or inspection of these documents, on his undertaking to that effect." *Richardson v. Hastings*, 7 Beav. 354.

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Now, here, the plaintiffs represent the landlord; the defendants are the lessees; and by the contract between the parties, independently of their relative situation, which would be quite sufficient for the purpose, there happens to be a distinct stipulation that the accounts shall be so kept as to give the landlord all the information which he is now asking with respect to the management of the property. This being mining property, he has an interest in ascertaining what the course of proceeding is. Has he not a right to ask his lessee what documents there are to show that? From the connection between the plaintiffs and the defendants, there is no doubt the plaintiffs are entitled to an answer to that question. Then, on what grounds do the defendants refuse to answer it? That somebody else, who is not before the court, is interested in the account. This is the first time that objections for want of parties have been raised upon exceptions to an answer.

Then, if the plaintiffs are entitled to the discovery which they ask, have the defendants stated that which makes it impossible for them to give it? That is the only question which remains. The facts may be such as to make it impossible for the defendants to give the discovery; because they may, on applying for an inspection of these documents, be refused. But they have not said so: and as to the answer being full, it is made not full by the defendants' own statement. It is full in terms; but the defendants state that which they obviously state for the purpose of explaining what they mean when they say they cannot make the discovery; namely, that [\*113] there are documents in the possession of the company of which the defendants are members and trustees, and also in the hands of the company's agent in America. They do not say that they ever applied for an inspection of those documents and were refused. They merely say somebody else has got the documents. Suppose a defendant should say his documents are in the hands of his own solicitor, but his solicitor refuses him access to them. The court would give him time to take such proceedings as might be necessary to compel the solicitor to give him the means of making the discovery. So, if the defendant should say, I cannot answer, because the documents are in a distant part of the world. That may be a very good reason why you should ask for time to answer, but no reason why you should not answer; and, therefore, you cannot resist exceptions for want of an answer on any such ground. If it is in your power to give the discovery, you must give it; if not, you must show that you have done your best to procure the means of giving it.

The case referred to in the House of Lords and that before Lord Eldon were cases in which the defendant insisted on a right in himself to resist discovery, and therefore to resist production. But those cases are quite distinct from the cases in which the court refuses to order a party to produce documents, not because he has a right to withhold them, but because he is not able to produce them. The distinction is very clearly marked, and shows that those cases can have no application to the present.

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The counsel for the appellants having declined to argue the remaining exceptions, after this judgment on the first, the appeal, as to all the exceptions, was dismissed with costs.[3]

[3] In a subsequent suit, between the same parties, in relation to the same subject, the defendants were examined before the master, substantially, as to the matters inquired of by the bill in the case *supra*, and the disclosure was evaded upon much the same grounds. The master having reported the examination sufficient, exceptions were taken by the plaintiffs to the report, which exceptions were allowed by Vice-Chancellor Knight Bruce, 1 Yo. & Coll. C. C. 128, who in delivering his judgment says: "These books and documents belong to, and are in the possession of the joint stock company or partnership, &c. The company's affairs are managed by directors, of these, the lessees (defendants) now before the court are two, and being proprietors of shares, they are members of the partnership. The books being thus in the possession of the partnership must, *prima facie*, be held to be at least accessible to the defendants. They are in the personal keeping and custody of the secretary or clerk of the partnership, who is the servant of the directors, as managing for the partners; and it is stated, and no doubt truly, that the board of directors or such of them as have assembled, have passed a resolution, that the secretary shall not allow to two of their body—two of his employers and masters, namely, the defendants—the means of information upon this particular subject, by access to the books. It is not suggested by the defendants that there is any legal or equitable, or moral justification for the course which is said to have been thus pursued; it is not attempted to be maintained, that justly, honestly, or fairly, this ought to have been, or to be done. And the question is, whether under all the circumstances, I can allow the defendants effectually to say, that the books are inaccessible to them; or that if accessible, they are not bound to look into them.—The proposition is one, which if granted, would open a door to great abuse and oppression. It would stand in the way of the administration of justice, and in my opinion, unfairly prevent the arrival at truth. If any substantial difficulty were shown, that might be a reason why time should be given to the defendants. Such however is not the contention here. Conceiving it to be the duty of the defendants to inspect the books if they can, and that they have not sufficiently, or in a manner to which a court of justice ought to attend, shown that they cannot, I hold the examination insufficient." On appeal, the Vice-Chancellor's order was affirmed. Lord Lyndhurst: "The defendants are the lessees of the mines: the legal estate is in them; they are also directors of the association, and proprietors or shareholders in the concern. As proprietors they have by the very terms of the deed of association, a right subject to certain regulations as to time, &c. to inspect and take copies of the documents in question; and as directors, they have a right to the inspection of them at any time; the possession of the secretary is their possession; he is their servant; and their co-directors have no right to exclude them. Is it sufficient then for a party who is required to speak as to the contents of such documents as are in his custody, possession, or power, to say, that he cannot comply with the order because his documents are wrongfully withheld from him? I think not. Suppose an agent withholds papers belonging to his principal, would the statement of such a wrongful act be an excuse for not producing them, or not speaking as to their contents? In a former case between these parties, Lord Cottenham put the case of a solicitor wrongfully withholding the papers of his client, as affording no excuse for the non-production: the court, he said, would allow the party time to vindicate his right; and the same principle will apply here, though the difficulty may be somewhat greater. A party is bound to inspect, and answer as to the contents of all documents that are in his possession, or power; and all that he has a right to inspect, provided he can enforce that right, are in his power." *Taylor v. Rundell*, 1 Phillips, 222. S. C. 1 Yo. & Coll. C. C. 128, 131. Lord Wharncliffe, one of the defendants, who was examined upon interrogatories under the decree in the cause was required to set forth certain entries in the books of a firm of which he was a member; he stated in his answer, that he and his co-partners had given express directions to their agent, in whose custody the books were, not to produce them to any one, or allow any stranger to inspect them, without the express authority of the defendant and his co-partners; that the books were not in the power of the defendant alone, but of the defendant and his co-partners, and that the defendant had

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no right or lawful power to produce them, or set forth their contents, without the consent of his co-partners. It was held that the answer was insufficient, as the defendant did not state that his co-partners had refused to consent to his setting forth the entries. Shadwell, V. C. "Unless a physical inability is made out on the answer, my opinion is that the court must hold that he is bound to set forth the contents." *Stuart v. Lord Bute*, 11 Sim. 442, 453. Lord Wharncliffe being again examined put in a further answer stating, that the books were in the joint custody of himself and his co-partners, and that he had asked their permission to inspect and make extracts from the books, to enable him to comply with the requisitions of the interrogatories, but that they had refused to permit him so to do: the answer was held insufficient. Shadwell, V. C. "He does not state that he and his co-partners became parties under such a contract as disabled any one of them, without the express permission of the other two, to inspect the books or make extracts from them. Nothing of the kind is stated.—I cannot comprehend how an order given by A. B. and C. being partners, to their agent or servant, can have the effect of giving up the right of the partners, unless there was some contract that it should be given up. One partner would, as a matter of course, have dominion over his agent or servant, though he was the agent or servant of the partnership. The effect of the order given in 1838, was to prevent any *stranger* from inspecting the books; but I do not see that any order was given which would have the effect of disabling Lord Wharncliffe, himself, from examining the books: and if he had given an order as against himself, the same power which enabled him to give the order, would have enabled him to revoke it.—If Lord Wharncliffe had stated that he had gone to Newcastle, and had proceeded to examine the books: but that an opposition was made, I mean such an opposition as amounted to a civil representation to his lordship, that if he persisted, force would be used, *that* would have been a very good reason for holding that he was not bound to do anything more. But there is no such statement in his further examination. And as no case is stated which shows that it was necessary for his lordship to ask permission to inspect the books and that he did ask it and was refused, my opinion is that it does not sufficiently appear on the examination, that his lordship is justified in not complying with the requisitions of the interrogatories." *Stuart v. Lord Bute*, 12 Sim. 460. S. C. but on a different point, 13 Sim. 453, where it is mentioned that the foregoing decision of the Vice-Chancellor, on the further answer, was affirmed by the Lord Chancellor. It appears from the subsequent history of the case, that Lord Wharncliffe did, after his second examination, go to the office of the company at Newcastle, for the purpose of inspecting the books, but that the inspection was refused by a person who was, or assumed to be, the agent of the company.—In answer to a bill seeking to impeach a security and requiring the defendant to set forth what communications passed between his solicitor and agents in the transaction and the plaintiff; and what letters were written and received, and entries made on the subject by such solicitors, it is not sufficient for the defendant to say, that the solicitors had ceased for several years since the transaction to be his solicitors or agents, and that he does not know what communications or entries they had or made; the defendant, if he has not personal knowledge of the facts, must at least show that he has endeavored to acquire the information from his agents in the transaction in question. *Earl of Glengall v. Frazer*, 2 Hare, 99. It has been held that where a co-partner resided in Constantinople, it was sufficient for him to offer in his answer to produce all books, &c. at that place, under an oath to be settled by a master. But in general a defendant must procure books, &c. from a foreign country, for which a reasonable time will be given. 1 Hoff. Ch. Pract. 308, and cases there cited.

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1839.—Murray v. Walter.

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*\*Between* CLARISSA MURRAY. WIDOW OF JAMES MURRAY, Plain- [\*114]  
tiff; *and* JOHN WALTER, THOMAS MASSA ALSAGER, AND JOHN  
JOSEPH LAWSON, Defendants.(a)

1839: August 7.

The defendant, by his answer stated that certain books relating to a concern in which the plaintiff claimed to be a partner with the defendant were in the possession of the treasurer of the concern, on behalf of the several shareholders in it, many of whom were not parties to the suit; Held, that the defendant could not be ordered to produce the books in question.

Where one part of a motion is of course, and the other part is contested and refused, the court, although it grants that part which is of course, will order the party moving to pay the costs of the motion.

ON the 6th of November, 1819, the defendant Walter, being possessed of several sixteenth shares in the newspaper called *The Times*, assigned to the plaintiff's deceased husband, James Murray, in consideration of a sum of 1400*l.*, one-half of one-sixteenth share in the newspaper and the profits thereof, from the 1st of November then last, subject to a right of repurchase, which the defendant Walter reserved to himself, during his life, so long as he should retain any share or interest in *The Times*, upon giving to Murray, his executors, administrators, or assigns, six calendar months' notice in writing, to be computed from the 30th of June or the 30th of December.

Some time after Murray's death, Walter in compliance with the terms of the assignment, gave to the plaintiff, who was her husband's administratrix with his will annexed, a notice of his intention to repurchase the share which had been assigned to her husband, at the expiration of six calendar months, to be \*computed from the 30th of December, 1837; which [\*115] period would terminate on the 30th of June, 1838.

The bill alleged that the defendants, and divers other persons whose names the defendants had concealed from the plaintiff, and were at present unknown to her, were interested, in different shares and proportions, in the partnership or undertaking of printing and publishing "*The Times*" newspaper; and that no account in writing of the profits of the newspaper had ever been rendered to James Murray, or the plaintiff: and it stated various circumstances upon which it founded a charge that the defendant Walter had waived or released all right or title to exercise the power of repurchase, and that the notice of repurchase was void; and that the plaintiff had been, since the expiration of that notice, and still was entitled to one-half part of one-sixteenth share in the newspaper. It charged that the defendants ought to set forth an account of the gross receipts and expenditure of the newspaper from the date of the assignment down to the 30th of June, 1838, and an account of the profits of the newspaper accrued since that day; and also the

(a) This case would have been reported in Messrs. Mylne & Craig's Reports; but in consequence of the reference which was made to it in the argument of the case of *Taylor v. Rundell*, *supra*, it has been thought desirable to print it here.



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had been so taken and made, and such accounts kept by such treasurer, who was the common agent of the proprietors, and authorized by them for that purpose; and that Murray, who was also a writer for the newspaper, had been well acquainted with the duties of the treasurer, and with the mode of stating such accounts and ascertaining such balances, and that such accounts might at all times have been inspected by Murray in his lifetime, and that he was fully satisfied with and acquiesced in such mode of keeping and stating the accounts, and ascertaining the balances from time to time.

The defendant said he could not set forth any account of the gross receipts or expenditure of the newspaper, from the date of the assignment down to the 30th of June, 1838, in every year, nor any account of the profits accrued since the 30th of June, 1838, and he denied, for the reasons and under the circumstances in his answer stated, that the plaintiff was or had been since the 30th of June, 1838, interested in the alleged partnership business, or in the newspaper, to the extent of the one-half sixteenth share assigned to her husband, or to any other extent. He submitted that all the proprietors of shares in the newspaper were necessary parties to the suit, if the plaintiff sought or was entitled to the accounts prayed for by her bill; and he stated that, when he gave the notice of repurchase, and now, he was entitled to half of a sixteenth share in the newspaper besides the half sixteenth share assigned to Murray, and that he was entitled to another sixteenth share, in remainder, expectant upon the death or sooner contingent determination of the interest of a person to whom his (the defendant's) father had bequeathed it for life, with remainder to the defendant.

[\*120] \*The defendant stated, that he had, in the schedule to his answer, set forth a list of the several papers, writings, and documents which were in his possession, custody, or power relating to the matters mentioned in the bill, or any of them; and save as he had in the schedule mentioned and set forth, he denied that he had in his possession, custody, or power, any books, papers, or documents relating, either in the whole or in part, to the matters or alleged matters mentioned in the bill, or any of them, although he believed that the treasurer of the newspaper, Mr. Delane, had in his custody the several receipts which had been given for the dividends on the profits of the newspaper, and also some books of account in which he kept accounts of his receipts and payments in respect of the newspaper, the particulars whereof, however, the defendant did not know nor could set forth as to his information and belief, save as before mentioned.

The only documents specified in the schedule were the indenture of assignment from the defendant to Murray, and certain letters written to the defendant's solicitor.

Exceptions having been taken to this answer for insufficiency, the defendant Walter, afterwards, put in a further answer, by which he stated that he had caused application to be made to Mr. Delane, the treasurer, by whom the accounts of the newspaper were kept, for a list of all such receipts as had been



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given for the dividends upon the profits of the newspaper, and of the books of account in which Mr. Delane kept accounts of his receipts and payments in respect of the newspaper; and that in answer to such application, he had been informed by Mr. Delane, and he believed it to be true, that Mr. Delane had now in his possession, as such treasurer, and in such manner, and for such \*purpose, as in the defendant's former answer was men- [\*121] tioned, the several books, receipts, and vouchers mentioned in the schedule annexed to the present answer; and the defendant denied that the same or any or either of them were or was in the possession, custody, or power of himself (the defendant) or of the other defendants to the bill or either of them, save so far as the possession of Mr. Delane might be the possession of the defendants to the bill and the other shareholders of the newspaper, which the defendant submitted to the judgment of the court. He said he believed that the plaintiff had never applied to Mr. Delane for an inspection of any of these books, receipts, or vouchers: that he believed that other account books, receipts, and vouchers relating to the accounts of the newspaper of earlier dates than those which he had mentioned to be now in the possession of Mr. Delane had been, from time to time, kept; but the defendant could not set forth the particulars of any of them or what had become of any of them, save that he had been informed and believed that they had all been destroyed as useless.

The schedule to the further answer enumerated certain books, called "publishing books," commencing on the 1st of January, 1821, and continued down to the present time; a cash book, commencing on the 2d of January, 1837; three ledgers, the first commencing in January, 1831; a journal of credits, commencing in June, 1831; several bundles of weekly accounts; and the receipts for the dividends, from the month of December, 1833, to the 30th of June, 1838, and one banker's book commencing in April, 1838.

The answer of the defendant Alsager stated that, to the best of his belief, the accounts of the receipts and payments of the newspaper had been kept by the treasurer, \*as the common agent of all the proprietors, [\*122] authorized by them for that purpose; that he believed that the treasurer had now in his possession the several receipts which had been given by the proprietors for the sums from time to time paid to them in respect of their several shares of the profits, and that he had also in his possession some books of account, in which he kept accounts of his receipts and payments in respect of the newspaper, the particulars of which the defendant could not set forth.

The answer of the defendant Lawson, contained a statement to the same effect as that which is above given from the answer of the defendant Alsager.

The plaintiff moved, before the Vice-Chancellor, that the defendant Walter might be ordered to produce and leave with his clerk in court, for the usual purposes, the indenture of assignment, and the letters enumerated in the sche-

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dule to his first answer; and that all the defendants might be ordered to produce and leave with their clerk in court, in like manner, the several books, papers, and writings enumerated in the schedule to the further answer of the defendant Walter, and thereby stated to be in the possession of Mr. Delane; or otherwise that the plaintiff, her solicitors and agents, might be at liberty to inspect the same, at all seasonable times, at the office of The Times newspaper, on giving reasonable notice to the defendants, at the office; and that she might also be at liberty, at her own expense, to take copies and extracts from the said several indenture, letters, books, papers, and writings, as she might be advised; and that the defendants might be ordered to produce the indenture, letters, books, papers, and writings before the examiner, and at the hearing of the cause.

[\*123] \*The Vice-Chancellor ordered the production of the documents mentioned in the schedule to the first answer of the defendant Walter, but refused the rest of the motion, and ordered that the plaintiff should pay the costs of the application.

The plaintiff now renewed, before the Lord Chancellor, that part of the motion which had been refused by the Vice-Chancellor; and she, at the same time, moved that the Vice-Chancellor's order, so far as it directed that she should pay the costs of the motion before his honor, should be discharged.

Mr. *Richards* and Mr. *Romilly*, in support of the motion, commented upon the statements and admissions made by the defendant Walter in his answer and further answer, and cited *Walburn v. Ingilby*.(a)

Mr. *Knight Bruce* and Mr. *Bacon*, *contra*, referred to *Adams v. Fisher*.(b)

Mr. *Richards*, in reply, contended that the plaintiff, as a partner, had a right to inspect all the partnership books and papers, in the possession of the common agent of the partners, and urged the extreme difficulty of bringing before the court so numerous a body as the partners in this concern, amounting in number, as they did, to thirty-six, of whom eight were out of the jurisdiction of the court. He contended that if the books and documents in question were in Mr. Walter's own possession, he could not refuse to produce them to the plaintiff; and that the possession of the common agent of himself and his co-partners, was equivalent to his own possession.

[\*124] \*THE LORD CHANCELLOR:—In this case, the plaintiff claiming to be a partner in a concern, namely, The Times newspaper, up to a certain time, files a bill against the three defendants, alleging that they are partners in the concern, with others, whose names the plaintiff does not know. One of the defendants, by an answer, and a second answer, says, that there are certain documents which are not in his own possession, but in the

(a) 1 Mylne & Keen, 61, see pp. 78, 79. [S. C. Coop. Sel. Cas. 270.]

(b) 3 Mylne & Craig, 526.

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possession of the treasurer of the partnership, namely, the party answering and the two defendants, who are partners, and several other partners whose names are mentioned in the answer.

The motion is against the three defendants, that they may be ordered to produce these documents.

In the first place, the two other defendants have not made any admission upon which any order at all could possibly be made.

The one defendant, upon whose answer alone any order at all could be made, states that the treasurer holds the documents on behalf of the defendant himself, of his two co-defendants, and of certain other persons whose names he mentions.

The only order which could possibly be made would be an order against that defendant who has made this admission; but to order him to produce these documents would be contrary to what I have always understood to be the practice of the court. When documents are stated, in the answer, to be in the possession of A., B., and C., you cannot order that A. shall produce them; and that for the best possible reason, namely, that he could not produce them.

\*The court would not pronounce the order for the production of [\*125] the documents, unless the defendant was in a situation to justify the court in making such an order upon him. How can the court be satisfied that the defendant ought to produce the documents? He is not the proprietor. They are not in his possession, but in the possession of an agent, not of himself only, but of other persons.

It is perfectly true that, if documents are in the hands of an agent, the principle of the court is, that the possession of the defendant's agent is the possession of the defendant against whom the order is made. But here the agent is the agent, not only for the defendant against whom the order is prayed, but also for other defendants. The defendant against whom the order is prayed has not the possession of the documents, either personally or through an agent.

I have always understood the rule to be, that, under such circumstances, the court would not make an order for the production.

The case of *Walburn v. Ingilby*, as reported, no doubt, seems to infringe upon that rule. All I can say is, I never considered that the practice was altered by that case. There must have been some peculiarity in that case which does not appear in the report; for an order for the production of the documents appears to have been made by the Vice-Chancellor and affirmed by the then Lord Chancellor.

I think that this appeal motion must be refused with costs.[1]

[1] The editor has on former occasions stated, or referred to numerous authorities regarding the many *questiones veratae* arising from the claims of a party to the inspection or production of books, &c., in the custody or under the control of another; see 2 Sim. & Stu. 311, n. 1; 4 Russ. 191, n. 1; id. 194, n. 1; 3 Myl. & Cr. 359, n. 1; id. 546, n. 1, 549, n. 1; id. 638, n. 1; 1 Keen,

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[\*126] \*Mr. *Richards* asked the Lord Chancellor, whether he thought the Vice-Chancellor ought to have ordered the plaintiff to have paid the costs of the motion before his honor, since she was entitled to the production of some of the documents.

THE LORD CHANCELLOR:—Where the real substantial contest between the parties is one thing, and it is mixed up with another about which there is no real contest, I think it very fit that the party applying should pay the costs, if he fails as to that which is the substantial matter of contest. Upon the same principle, where a party presents an appeal, although he may succeed upon some small matter, he has to pay the costs.

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 BUCKERIDGE v. GLASSE.

1840: November 6. 1841: January 20.

Part of a sum of money which had been raised by a husband upon the security of property comprised in his marriage settlement, by means of a suppression of the settlement, was lent by him to the trustee of the settlement upon his bond, the trustee being ignorant of the means by which the money had been raised. After the death of the husband, the wife, who was entitled to a life interest in the settled property, with remainder to her children, took out administration to her husband, and filed a bill, in her own name and in the names of her children by herself as their next friend, against the trustee, who had in the mean time taken the benefit of the insolvent debtor's act, praying that the sum due upon the bond (which the widow, as administratrix, offered to deliver up) might be replaced, with interest, upon the trusts of the settlement. Held, that the widow and children had a clear equity to follow the money in the hands of the trustee, and that they would have had the same equity if, instead of being a trustee, he had been a stranger; and *semble*, that such a claim would not have been barred by the trustee's discharge under the insolvent debtors' act, even if it had been proved (which it was not) that the bond debt had been included in his schedule.

By indentures of lease and release, dated the 20th and 21st of February, 1822, being the settlement made on the marriage of Charles Elliott [\*127] Buckeridge with \*Eliza Eyre, two undivided fifth parts of certain houses in the parish of St. Giles, in the county of Middlesex, together with an annuity of 100*l.* per annum, were vested in the defendant and another person, since dead, upon trust to pay one moiety of the income to the wife for life, for her separate use, and the other moiety to the husband for life; and, upon the death of either, to pay the whole of the income to the survivor for life; and, upon the death of the survivor, to convey and assign the trust property to such of the children of the marriage as the husband should appoint, and in default of appointment, to the children equally.

In the year 1825, Buckeridge, being embarrassed in his circumstances,

353, n. 1, 2; *id.* 355, n. 1; *id.* 357, n. 1; 1 Beav. 146, n. 2; 9 Sim. 443, n. 2; *ante*, 113, n. 3. And see the following cases, which from the recentness of their publication had not before fallen under the notice of the editor; *Smith v. The Duke of Beaufort*, 1 Phillips, 209, affirming S. C. 1 Hare, 507, cited 1 Myl. & Cr. 546, n. 1; *Edwards v. Jones*, 13 Sim. 632; *Green v. Pledger*, 3 Hare, 170.

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1840.—Buckeridge v. Glasse.

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went to reside abroad, and continued abroad until the year 1835, when he died intestate, leaving his widow and several children surviving him, and without having exercised the power of appointment. After his death, the bill in this cause was filed by Eliza Buckeridge his widow, in her own name, and by the children of the marriage, who were all minors, by her as their next friend, alleging that the trustees had neglected the trusts, and had permitted the husband to receive the whole of the rents of the two-fifth parts of the houses comprised in the settlement and of the annuity, and that no part of such rents or annuity had ever been paid to her or applied for her benefit, and that Buckeridge had, in the month of December, 1822, mortgaged the property for the sum of 700*l.* and interest, and that the mortgagee had taken possession. The bill then alleged that the mortgage was the result of a scheme concerted between Buckeridge and the defendant for the purpose of raising money for their mutual benefit, and charged that the 700*l.* had been procured by the instrumentality of Mr. Beavan, who was the solicitor of the defendant; and that immediately \*upon its [\*128] being received by Buckeridge, 350*l.*, part of it, had been lent by him to the defendant upon the security of his bond. The bill stated that the plaintiff, Eliza Buckeridge, had taken out letters of administration to her husband's effects, and was in possession of the bond as his administratrix, and that she was willing to deliver it up, on being paid the 350*l.*, with interest; and the bill prayed that the defendant might be declared liable to repay the sum of 350*l.* and interest; and that he might be decreed to pay what, upon taking an account, should be found to be due from him in respect thereof; and that the same might be applied according to the trusts of the settlement, or otherwise, as the court should direct; and that the defendant might be discharged from being a trustee of the settlement, and that some other person might be appointed in his place.

The defendant, by his answer, stated that he knew nothing either of the settlement or of the particulars of the property comprised in it, except that he remembered that, upon the occasion of his dining at the house of Mr. and Mrs. Buckeridge, shortly after the marriage, Buckeridge produced an instrument which he represented to be his marriage settlement, and requested the defendant to be a trustee of it, at the same time assuring him that he would never be called upon to act in the execution of the trusts: that, relying on that assurance, and under the influence of an appeal made by Buckeridge to their former friendship, he had signed the instrument; but that he had never read it, or been made acquainted with its contents. That statement was in part corroborated by the deed itself, which was proved as an exhibit on the part of the plaintiffs, and which appeared to have been signed by the defendant, without the attestation of any witness.

\*With respect to the mortgage transaction, the defendant positive- [\*129] ly denied that it was concerted between him and Buckeridge, or that he was privy to it, further or otherwise than that, in the month of December,

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1840.—*Buckeridge v. Glasco.*

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1822, being in want of money, and hearing that Buckeridge was about to raise some money upon mortgage (but of what property it never occurred to him to inquire,) he had applied to him for a loan of 350*l.*, and that Buckeridge having acceded to his request, that sum was advanced to him, by being paid, on his account, to Mr. Beavan his solicitor, to whom he was then indebted. The defendant, however, insisted that that sum was so advanced to him as a loan from Buckeridge personally, and that it was not otherwise connected with the mortgage than that he believed it was part of the loan which Buckeridge obtained upon that security, and that in order to enable him to comply with the defendant's request, he raised a larger sum than he would otherwise have done.

The answer further stated that Mr. Beavan had procured the loan of the 700*l.* in pursuance of the instructions from Buckeridge, and not as the solicitor of the defendant; and that the defendant was not aware, at the time, that the premises proposed to be mortgaged for raising that sum were subject to the settlement. This statement was confirmed by the evidence of Mr. Beavan, who was examined as a witness by the defendant, and who said not only that he had procured the loan as solicitor for Buckeridge, but that, at the time at which the money was raised, he (Beavan) asked Buckeridge, in the defendant's presence, whether the property about to be mortgaged was affected by any marriage settlement, and that Buckeridge then replied that it was not.

[\*130] \*The defendant then stated that he had no recollection of the circumstances connected with the execution of the mortgage; but that he had caused a search to be made in the office for registering deeds in the county of Middlesex, and that the result of such search was the discovery of a memorial of a deed, dated the 23d of December, 1822, purporting to be a mortgage of the premises in question, to which Buckeridge and the plaintiff his wife were parties of the one part, and one Mary Coulthard was a party of the other part, and which appeared to have been duly executed by the plaintiff Eliza Buckeridge as well as by her husband: and the defendant insisted that it was evident from that circumstance, and also from the length of time during which, as he had been informed, the mortgagee had been in possession, that the mortgage mentioned in the bill had been executed, if at all, with her privity and concurrence.

The defendant admitted that the 350*l.* secured by the bond was still unpaid; but he insisted that he was no longer liable for it, inasmuch as he had, in the year 1831, been discharged under the provisions of the act for the relief of insolvent debtors. The only evidence, however, that was adduced in support of this ground of defence was an office copy of the order of adjudication of the insolvent debtors' court in the insolvency of a person answering the defendant's name and description, and a deposition of the witness who verified that copy, that the bond was comprised in the schedule of the debts of the insolvent therein named.



1840.—Buckeridge v. Glasco.

Upon the hearing of the cause, before the Vice-Chancellor, on the 13th of July, 1840, his honor made a decree, directing that so much of the bill as related to \*the repayment of the 350*l.* and interest should be [\*131] dismissed with costs; but ordering that the defendant should be discharged from being a trustee, and referring it to the master to appoint new trustees of the settlement.

The plaintiffs having appealed from the first part of that decree, the appeal now came on to be heard.

Mr. *Wakefield* and Mr. *Randell*, for the plaintiffs, in support of the appeal.—The Vice-Chancellor dismissed the bill, except so far as it sought the appointment of new trustees; because he thought that there was a misjoinder of plaintiffs, and that Mrs. Buckeridge could not join with her children in complaining of a breach of trust in which she had concurred. But the answer to this objection is twofold, viz., first, that Mrs. Buckeridge's alleged concurrence in the breach of trust consisted in her assigning a contingent interest, which as a *feme covert*, she was incapable of doing; and, secondly, if her interest was only an interest which entitled her to call for the appointment of a new trustee, which was one of the objects of the suit, she, at all events, had an interest in that object, and her children had an interest to the whole extent of the suit, and it has never been held that every co-plaintiff need be interested to an equal extent. The familiar case of a tenant for life and remainder man joining as co-plaintiffs, is evidence that there is no rule which would prevent the adoption of such a frame of suit.

It will, perhaps, be objected that the plaintiffs have not proved the defendant's execution of the settlement; but they have proved his signature as one of the executing parties, and that proof is sufficient evidence of his acceptance of the trusts.

\*It is stated that, since the breach of trust complained of, the de- [\*132] fendant has taken the benefit of the insolvent debtors' act; but it has not been proved by evidence that such is the case; much less is it proved that the debt constituted by the breach of trust was included in the schedule, which, if he was discharged under that act, he must have filed. But, even if both these points had been proved, the proof of them would avail him nothing in answer to a demand such as that which is now made against him; for the act of parliament does not discharge the insolvent from an equitable debt, which this is.<sup>(a)</sup> Besides which, it may be said that, in fact, a debt resulting from a breach of trust does not distinctly exist until the decree of the court declaring the trustee liable has been made; and, in this instance, that decree has, of course, not yet been pronounced, and, consequently, the debt would not be a debt existing at the time of the insolvent's discharge, and therefore not one from which, even if a legal debt, he could be absolved.

<sup>(a)</sup> 7 G. 4, c. 57; see ss. 46, 50, 57, 58, 61; and see also as to the extent of the operation of the discharge under the insolvent debtor's act, *Ex parte Barrington*, 2 Mont. & Ayr. 255.

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 1840.—*Buckeridge v. Glasse*.
 

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Mr. *Girdlestone* and Mr. *Keene*, for the defendant.—The bill is framed rather as an action on the bond than a suit in equity seeking relief on the ground of a breach of trust; for, if the claim were of the latter description, it would be good to the extent of 700*l.*, if at all.

It may be admitted that it is not necessary, as against a trustee, to prove the execution of the trust deed, provided you bring home to him knowledge and acceptance of the trusts; but, in the present case, it is necessary [\*133] for the plaintiffs to prove that, at the time at which the transaction complained of took place, the defendant knew of the trusts of the deed, and that he joined in the transaction, knowing that it was a fraud upon the settlement; but this the plaintiffs have not done; for, although they have proved that his name, affixed to the deed, is in his hand-writing, they have given no evidence to show when his signature was adhibited, and it may, therefore, for anything that appears to the contrary, have been put to the deed after the alleged breach of trust had been committed.

Mrs. *Buckeridge* has, by acquiescence, precluded herself from suing; and her being joined as a plaintiff with others who may not be so precluded is fatal to the suit; *Bill v. Cureton*.(a) She not only joined in the mortgage at the time, in the year 1822, but she made no complaint till the month of December, 1836, when the present bill was filed.

Mr. *Wakefield*, in reply.

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The reporters are informed that the mortgage deed of December, 1822, which has not been proved in the cause, was afterwards handed to the Lord Chancellor.

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1841: Jan. 20.—THE LORD CHANCELLOR:—So much of the bill was dismissed with costs, by the decree of the 13th of July last, as related to the repayment of the 350*l.* and interest; not, as I understand it, from any doubt upon the merits, but because the Vice-Chancellor thought that the [\*134] plaintiff, *Eliza Buckeridge* the elder, had been so far a party to the breach of trust as to preclude her from the right to complain of it, and that the infants, being associated with her as co-plaintiffs, could not have a decree, though entitled on the merits; for there cannot, I think, be any doubt but that the 350*l.* is part of and ought to be restored to, the trust fund, the facts being shortly these:

[His lordship then stated the substance of the settlement of the 21st of February, 1822, and proceeded as follows:—]

The name of the defendant *Glasse* appears to this deed, which is proved to be in his hand-writing; but there is no attestation of his having executed the deed, and he says in his answer that he never knew the contents of it.

(a) 2 *Mylne & Keen*, 503.

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 1841.—Buckeridge v. Glasse.
 

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On the 23d of December, 1832, notwithstanding this settlement, the husband took upon himself to convey these two-fifths of the houses to Mary Coulthard, by way of mortgage for 700*l.*, with a power of sale, which mortgage deed recites his title as absolute owner of the property, and by which he covenants that he and his wife will levy a fine to perfect the mortgagee's title. But, assuming, as the deed does, that the husband was seised of the fee, such fine could only have been intended to bar the wife's title to dower. From passages read out of the defendant Glasse's answer, it was admitted and proved that a Mr. Beavan was, at this time, solicitor both for the husband and Glasse; and that, before the loan was negotiated, Glasse, having heard of the husband's intention to raise money, applied to him for a loan of 350*l.*, to which the husband having assented, the amount of the sum to be raised was increased accordingly. The sum of 350*l.*, part of the money so \*borrowed, was not, indeed, paid to the defendant Glasse, [\*135] but, by his direction, retained by Mr. Beavan in discharge of a debt due to him from Glasse; and thereupon the defendant executed a bond to the husband for the 350*l.*

It may be that this scandalous attempt to defeat the settlement was the act of the husband alone; and it is probable that the mortgagee, having no notice of the settlement, obtained a good title; but, be that as it may, it is clear that the 700*l.*, so raised out of the settled property was affected with all the trusts of it, and that the *cestuis qui trust* are entitled to follow it; [1] and the answer admits that 350*l.* of it was received by Glasse; and that sum is either to be paid to the husband's estate, upon the bond, or restored to the trusts. It cannot be pretended that he has a right to insist upon the title of the husband's estate to receive the money; and the bond is offered to be given up by the plaintiffs. If Glasse had been a stranger, and free from any imputation of having committed a breach of trust, their equity would attach upon the fund in his hands; the husband or his estate could not, and in this case do not, resist it. It happens, however, that the 350*l.*, part of the trust fund, has, from the beginning, been in the hands of the trustee, although he may not have been aware that it was trust property; but can he, when informed of it, repudiate the trust, and insist upon paying it to those as against whom the equity to have the money restored to the trust is complete, and who do not ask it from him? [2] This appears to me to be a very plain equity; and if so, there is no foundation for the objection to the plaintiff, as having been a party to the breach of trust; but, if this were otherwise, how was she a party to the breach of trust? To preclude a party upon that ground, it must, at least, be shown that she was cognizant of the breach of trust, of which there is in \*this case, not only no proof, but not the least pro- [\*136]

[1] *Harvey v. Richards*, 1 Mason, 423.

[2] Under the circumstances, a party named as trustee in articles of marriage settlement, but who had not acted, nor executed any deed of trust, was allowed to sustain a suit to carry the deed into effect. *Cook v Fryer*, 1 Hare, 498.

1841.—Buckeridge v. Glasco.

bability of the fact being so. Such of the authors of the mortgage as knew thatt he property was included in the settlement, necessarily, for the purposes of the fraud, concealed that fact, and is it probable that they informed the wife? The mortgage deed, to which her name is added by interlineation, suppresses the fact of the settlement, and represents the husband as seised in fee. It would be strange if this deed, which was the instrument of the fraud of which she was to be the victim, should preclude her from asserting rights which the deed anxiously conceals; but besides all this, she was a married woman, and her execution of the deed was wholly inoperative. It is true that she had a life interest for her separate use in one-half of the income, and a life interest in remainder in the other half; the latter she could not dispose of, and she had no power whatever over the *corpus* of the trust property, of which the 350*l.* is part. It appears to me therefore, that all the facts are wanting which could preclude her from suing for the 350*l.*, upon the ground of her having been a party to the breach of trust; but, if there had been a case for that purpose, it could only have applied to part of the relief prayed; and she and her children have, in fact, a decree for other part; and I am not prepared to hold that the principle that parties, though entitled to relief upon the merits, cannot obtain it in a suit in which they are associated with co-plaintiffs who are not so entitled, ought to be so extended as to make it necessary that every plaintiff should be interested in, and entitled to every part of the relief. Such an extension would create great multiplicity of suits.[3]

I say nothing as to the case attempted to be made, on behalf of the defendant, under the insolvent debtors' act, 7 G. 4, c. 57; there being no evidence bringing the necessary facts before me. If the error as to the

[3] As to the general rule, that all parties joining as plaintiffs must have an interest in that subject, see *The King of Spain v. Machado*, 4 Russ. 225, 241, n. 1; *Cuff v. Platell*, id. 242; *Makepeace v. Haythorne*, id. 244; *Rogers v. The Traders Ins. Co.* 6 Paige, 584; *Feary v. Stephenson*, 1 Beav. 44. But, "the objection that there is a misjoinder of complainants can only be sustained, where several persons file a joint bill, for separate and distinct causes of action, having no connection with each other, neither as it respects the rights of the complainants, or the rights of the defendants. In this case the subject matter of the suit, in respect to all the parties is the same, though their rights and liabilities may be separate and distinct as it respects the distribution of the fund." Walworth, Circuit Judge; *Hawley v. Cramer*, 4 Cow. 728. *Fawcett v. Whitehouse*, 1 Russ. & M. 132, 148. A trustee and *cestui que trust* may unite as co-plaintiffs. *Schenck v. Ellingwood*, 3 Edw. Ch. Rep. 447. But not several creditors claiming distinct debts out of the same estate; the bill should be filed by one creditor, or such as have a joint demand, on behalf of himself, &c. and the other creditors, &c. *Dias v. Bouchaud*, 10 Paige, 447. Parties having conflicting interests should not be made co-plaintiffs. *Cholmondely v. Clinton*, Turn. & Russ. 116. *Grant v. Van Schoonhoven*, 9 Paige, 255. *Jacob v. Lucas*, 1 Beav. 436. *Hutchinson v. Reed*, 1 Hoff. Ch. Rep. 316. Pal. Pr. & Ag. (ed. by Dunl.) 54, n. x. Whether the objection of misjoinder may be urged at the hearing, although not previously raised by pleading or demurrer, does not seem to be definitively settled. The case in the text seems to assume the affirmative. See *Glyn v. Soares*, 3 Myl & K. 470; *Anderson v. Wallis*, 1 Phillips, 202; *Talmage v. Pell*, 9 Paige, 412; *Jacob v. Lucas*, *ubi sup*; *Schenck v. Ellingwood*, *ubi sup*; *Egan v. Hernan*, Fl. & Kel. 44; 4 Russ. 241, n. 1; 1 Sim & Stu. 188, n. 1.

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 1841.—Jefferys v. Jefferys.
 

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\*evidence had deprived the defendant of a defence which, if proved, [\*137] would have been available for him, it would have been to be regretted ; but such, I apprehend, is not the case, and that what in his answer he alleges to have taken place in the insolvent debtors' court would not protect him against the claim of the plaintiffs.

My order must be to reverse the decree of the Vice-Chancellor, so far as it dismisses part of the bill with costs, and to make it part of the decree, that the master do take an account of what is due for interest upon the 350*l.* ; and that the defendant pay that sum and interest ; which will be to be paid to the new trustees to be appointed under the Vice-Chancellor's decree. The costs of the suit will be to be paid by the defendant.

A question was then raised at the bar, from what time the interest was to be computed ; and if from the month of December, 1822, then whether, during the lifetime of the husband, it was to be computed upon the whole of the sum of 350*l.* or only upon a moiety.

THE LORD CHANCELLOR inquired, whether it appeared that the wife's moiety of the interest had been paid to the husband during his lifetime, observing that if that were the case, the defendant could not be called upon to pay it again ; for that, if a wife, having separate estate, permitted her husband to receive it, she could never have it back, the husband maintaining her in the meantime ; but it being stated that it did not appear that any interest had been paid by the defendant on the 350*l.* during the husband's lifetime, his lordship said that, that being the case, the interest account ought to commence from the month of December, 1822, but that \*inasmuch as [\*138] the bill did not seek to attach the husband's moiety of the interest, for the purpose of making good that part of the trust fund which he had appropriated, the account must, during the husband's lifetime, be limited to one moiety only of the interest.

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#### JEFFERYS v. JEFFERYS.

1841 : January 26 ; February 1.

A father having, by a voluntary settlement, conveyed certain freehold and covenanted to surrender certain copyhold estates to trustees in trust for the benefit of his daughters, afterwards devised part of the same estates to his widow, who, after his death, was admitted to some of the copyholds. A suit having been instituted by the daughters to have the trusts of the settlement carried into effect, and to compel the widow to surrender the copyholds to which she had been admitted, a decree was made for carrying into effect the trusts as far as they related to the freeholds, the plaintiff's title to them being complete ; but as to the copyholds, the bill was dismissed with costs.

By articles of agreement, dated the 25th of July, 1834, and made between John Jefferys of the one part, and Bowden and Thorn of the other part, John

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 1841.—*Jefferys v Jefferys*.
 

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Jefferys, after reciting that he was desirous of making some certain and irrevocable provision for the support and maintenance of his daughter Martha, Charlotte, and Sarah Jefferys, covenanted with Bowden and Thorn, as trustees, forthwith to settle all his real estate to the same uses, ends, intents, and purposes as were expressed in his will, dated the 25th of May, 1834; and, accordingly, he executed certain indentures of lease and release of the 16th and 17th of September, 1834, whereby, in consideration of the natural love and affection which he had for his three daughters, and for divers other good causes and considerations, he conveyed certain freehold hereditaments, subject to the incumbrances affecting the same, and covenanted to surrender certain copyhold hereditaments, to Bowden and Thorn, upon trust, out of the rents and profits thereof to pay to him an annuity of 80*l.* for his life; and after his death to sell the freehold and copyhold hereditaments, [\*139] and out of the moneys arising therefrom to pay off certain incumbrances, and to stand possessed of the residue of such moneys, upon certain trusts, for the benefit of his three daughters.

By the will of Sarah Jefferys, who died in April, 1835, all her interest under the settlement became vested in her two sisters. John Jefferys never surrendered the copyholds, pursuant to the covenant. In September, 1836, he died, having, by a will, dated the 18th of August, 1836, given part of the before mentioned freehold and copyhold estates to his wife Isabella, who was, shortly after his death, admitted to part of the copyhold estates.

In July, 1837, this bill was filed by Martha and Charlotte Jefferys against Isabella Jefferys and Bowden and Thorn, praying that the trusts of the indenture of the 17th September, 1834, might be carried into execution; and that Isabella Jefferys might be decreed to surrender the copyholds, to which she had been admitted, to Bowden and Thorn, as trustees of that indenture.

By the will of Martha Jefferys, who died in April, 1838, all her interest under the settlement became vested in her sister Charlotte Jefferys, the surviving plaintiff; and Isabella Jefferys having, since the filing of the bill, married one Abraham Peacock, a bill of revivor and supplement was filed by the surviving plaintiff.

The cause now came on to be heard before the Lord Chancellor.

Mr. *Stuart* and Mr. *Koe*, for the plaintiffs, contended that a voluntary settlement, although void against a subsequent purchaser, was good as [\*140] between the parties; \**Pulvertoft v. Pulvertoft*, (a) and that persons claiming under the will of the settlor, could not be in a better situation than the settlor himself. They cited the case of *Ellis v. Nimmo*, (b) in which the specific performance of a contract founded on meritorious consideration merely was decreed; and they argued that in the present case the transaction did not rest *in fieri*, as the settlement had been actually executed. They also cited *Osgood v. Strode*, (c) with reference to the benefit reserved to the settlor under the settlement.

(a) 18 Ves. 84.

(b) Lloyd &amp; Gould, Rep. t. Sugd. 333.

(c) 2 P. Wms. 245.



1841.—Jefferys v. Jefferys.

Mr. *Girdlestone* and Mr. *O. Anderdon*, for the defendants *Peacock* and his wife, insisted that it was a well established principle that the court would not interfere for the purpose of giving effect to a voluntary settlement; and that there was nothing in the circumstances of the present case to take it out of the general rule. They cited *Pulvertoft v. Pulvertoft*,<sup>(a)</sup> *Fortescue v. Barnett*,<sup>(b)</sup> *Hale v. Lamb*,<sup>(c)</sup> *Ward v. Audland*,<sup>(d)</sup> and also *Holloway v. Headington*,<sup>(e)</sup> in which they said the decision in *Ellis v. Nimmo* had been questioned: they also referred to an unreported case of *Dillon v. Coppin*,<sup>(g)</sup> lately decided by the Lord Chancellor, which was understood to have, in effect, overruled *Ellis v. Nimmo*.

Mr. *Wray* and Mr. *S. Miller* appeared for the other parties.

Mr. *Stuart*, in reply.

\*THE LORD CHANCELLOR :—The title to the plaintiffs to the free- [\*141] hold is complete; and they may have a decree for carrying the settlement into effect so far as the freeholds are concerned. With respect to the copyholds, I have no doubt that the court will not execute a voluntary contract; and my impression is, that the principle of the court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement. As, however, the decision in *Ellis v. Nimmo* is entitled to the highest consideration, I will not dispose of this case absolutely, without looking at a former case,<sup>(h)</sup> in which I had occasion to refer to that decision. Unless I alter the opinion I have expressed, the bill must be dismissed with costs, so far as the copyholds are concerned.

Feb. 1.—On this day his lordship said he had looked at the case alluded to, and that he saw no reason for altering the opinion he had before expressed.[1]

(a) 18 Ves. 84.

(b) 3 Mylne & Keen, 36.

(c) 2 Eden, 292.

(d) 8 Sim. 571.

(e) Ib. 324.

(g) 24th December, 1839. This case will be reported by Messrs. Mylne & Craig. [Since reported 4 Myl. & Cr. 647.]

(h) *Dillon v. Coppin*, mentioned *supra*.

[1] That there is a distinction between an executed, and an executory agreement in this respect, that the former, although voluntary, may raise a trust, and be enforced in equity, but that the latter must be supported by a consideration, see *Bunn v. Winthrop*, 1 Johns. Ch. Rep. 329; *Meek v. Kettlewell*, 1 Phillips, 342; S. C. 1 Hare, 464; *Blakely v. Brady*, 2 Dru. & Walsh, 311; *Doungworth v. Blair*, 1 Keen, 735; *Colyear v. The Countess of Mulgrave*, 2 Keen, 81; *Godsal v. Webb*, id. 99; *Collinson v. Patrick*, id. 123; *Hill v. Gomme*, 1 Beav. 540; *Davenport v. Bishop*, 2 Yo. & Coll. C. C. 451; *McFadden v. Jenkyns*, 1 Hare, 462; *Fletcher v. Fletcher*, 4 Hare, 67; *Hayes v. Kershaw*, 1 Sand. Ch. Rep. 253; 4 Myl. & Cr. 672, n. (1).

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 1841.—In the Matter of Marrow.
 

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[\*142]

\*In the Matter of MARROW,  
and

In the Matter of the Act 11 G. 4, and 1 W. 4, c. 60.

1841: March 17.

*Semhle*: The expenses of proceedings under the 11 G. 4, & 1 W. 4, c. 60, s. 5, for the purpose of obtaining a reconveyance of a mortgaged estate from a mortgagee of unsound mind, but not found such by inquisition, are to be borne by the mortgagor.

After an order, made on petition, has been drawn up, in conformity with the prayer of the petition, the court will not allow the petition and the order to be amended, but a new petition must be presented, praying that the order may be varied.

WILLIAM THOMPSON mortgaged an estate to Ann Marrow in fee, for securing 600*l.* and interest. The mortgage became absolute in the year 1838. In the year 1840, Thompson having become bankrupt, his assignees gave notice to the solicitor of Ann Marrow that the mortgage would be paid off, and they entered into a contract with the purchaser for the sale of the estate to him. When, however, the time for completing the purchase arrived, the purchaser objected to taking a conveyance from Ann Marrow, on the ground that she was then an inmate of a lunatic asylum. No commission of lunacy having issued, and her friends having declined to take one out, the assignees presented a petition, under the fifth section of the above mentioned act of parliament, upon which the usual order of reference was made.

The master having, by his report, certified, amongst other things, that the sum of 665*l.* was due for principal and interest upon the mortgage, and that he had approved of William Tristram Keightley as a proper person to receive that sum, and to reconvey the estate in the place of Ann Marrow, the assignees presented another petition to confirm the report; and, upon that petition, the Lord Chancellor made an order, *ex parte*, by which, after confirming the master's report, he directed that the petitioners should be at lib-

erty to deduct from the sum of 665*l.*, certified by the master to be  
[\*143] due for principal and interest on \*the mortgage, the amount of the costs and expenses thereafter directed to be taxed; and that, on payment of the mortgage money and interest, together with any further interest which might accrue thereon, William Tristram Keightley should, in the place of Ann Marrow, being of unsound mind, reconvey the estate to the assignees, freed and discharged from the mortgage; and his lordship referred it back to the master to tax the reasonable and proper costs and expenses of the petitioners incurred in and about the order of reference, and the proceedings consequent thereon, and in or about that application, and incident thereto and consequent thereon, except the costs of the reconveyance, which were to be paid by the petitioners.

An application was now made to the Lord Chancellor, on behalf of William Tristram Keightley, that the last mentioned order might be varied, by directing that the costs therein ordered to be deducted from the money due

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1841.—In the Matter of Marrow.

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on the mortgage should be paid by the assignees, and that the whole of what the master had reported to be due upon the mortgage should be paid to Keightley, for the benefit of the lunatic.

An understanding, with respect to costs, had in fact existed between the solicitors of the respective parties, but had been overlooked when the order was obtained.

Mr. *Mylne*, in support of the application.—The costs in question, having been occasioned by the lunacy of the mortgagee, fall within the general rule applicable to the costs of redemption, viz., that all the expenses incident to a reconveyance of the mortgaged estate, whether arising from the act of God or (with \*certain exceptions) even from the act of the mortgagor himself, subsequently to the mortgage becoming absolute, are to be borne by the mortgagor. [\*144]

It has been supposed, however, that *Ex parte Richards*(a) has introduced a different rule, with respect to costs in cases of this description; but that was an application under the 4 G. 2, c. 10, where a commission having actually issued, the inquiry was only whether the party was a mortgagee within the meaning of the act; the expense of which was so trifling, that it was probably not thought worth contesting. Under the recent act of 1 W. 4, c. 60, the reference is much more extensive, and all its provisions being introduced for the benefit of the mortgagor, it is reasonable that he should bear the expenses incident to them.

The next case after *Ex parte Richards* is that of *Ex parte Pearse*,(b) which was the case of a lunatic trustee in whom real estate had been vested to secure an annuity. The assignees of the grantor of the annuity, who had become bankrupt, having given notice of their intention to redeem the annuity, a petition for the reference under the 4 G. 2, c. 10, was presented by the assignees and the grantee jointly; and the question appears to have been exclusively as to the costs of the committee, which the court ordered to be paid by the assignees and the grantee in equal moieties; at the same time, however, declaring the general rule to be, that the costs of the committee of a lunatic trustee conveying under the statute should be paid by the *cestui que trust*. So that the court, in that case, seems to have considered the lunatic as trustee partly for the grantor and partly for the grantee of the annuity; for the apportionment \*of the costs between them could [\*145] not have been on the ground that they had joined in the petition, for *Ex parte Richards* shows that, as regards costs, it is immaterial by whom the petition is presented. But a mortgagee to whom money has been paid or offered to be paid, is, from that time, a trustee of the land for the mortgagor, and not, in any sense, for himself; and, consequently, there ought to be no distinction as to costs between the case of a trustee who is called upon by his *cestui que trust* to convey, and that of a mortgagee whom it is sought to redeem. If, in the one case, the expense of putting the party in

(a) 1 J. & W. 264.

(b) Turn. & Russ. 325.

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 1841.—In the Matter of Marrow.
 

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a capacity to convey is to be borne by the *cestui que trust*, in the other it ought to be borne by the mortgagor. But it has always been held that the costs of an infant trustee, who is ordered to convey under the stat. 7 Ann, c. 19, are to be borne by the *cestui que trust*; *Ex parte Cant.*(a) And the same rule has been applied to the costs of a lunatic trustee, under the stat. 4 G. 2, c. 10; *Re Tuffnell*, cited in *Ex parte Richards*;(b) and, on the same principle, in *Ex parte Tutin*,(c) Lord Eldon held that the costs of a commission of lunacy proposed to be taken out by the *cestui que trust* against a lunatic trustee, preparatory to obtaining an order for him to convey under the 4 G. 2, c. 10, were to be borne by the *cestui que trust*, which case was strictly analogous to an application for the reference under the 1 W. 4, c. 60.

Independently, therefore, of contract, there appears to be no reason why the costs and expenses of putting a lunatic mortgagee in a capacity to reconvey, should not, according to the general rule before adverted to, be borne by the mortgagor.

[\*146] \*In the present case, however, there was a distinct understanding between the assignees and the solicitor of the lunatic, that in consideration of the friends of the lunatic lending their assistance in prosecuting the inquiries directed by the reference, the whole of these expenses should be defrayed by the assignees.

Mr. Spence, who appeared for the assignees, having admitted that there was such an understanding,

THE LORD CHANCELLOR said, that if that was the case, the general question did not arise; and it was, therefore, not necessary for him then to decide it. His lordship, however, observed, that he had great difficulty in understanding the case of *Ex parte Richards*, which, when compared with the other cases which had been cited, would seem to make a difference between the case where the lunatic was a bare trustee, and one in which he was a mortgagee: and that being unable to see any solid ground for such a distinction, he should hesitate to follow the authority of that case whenever an opportunity for reconsidering the point should occur. His lordship also intimated, that the order of the 25th November, ought not to have been made *ex parte*, as the interests of the lunatic were materially affected by it.

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Mr. Mylne then asked for leave to amend the order, and the petition on which it had been obtained, in the manner that he had suggested; but.

THE LORD CHANCELLOR said, that as the order had been drawn up, it would be necessary to present a new petition, praying for a variation of the order; and his lordship directed that the costs of that application, and of such new petition, as well as the costs of the other proceedings, should be paid by the assignees.[1]

(a) 10 Ves. 554.

(b) 1 J. &amp; W. 264.

(c) 3 V. &amp; B. 149.

[1] Where an infant trustee is required to transfer the legal title under an order of the Court of

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 1841.—In the Matter of Walker.
 

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In the Matter of MICHAEL WALKER,  
and

[\*147]

In the Matter of the Act 11 G. 4, and 1 W. 4, c. 60.

1841: June 5.

The summary jurisdiction given to the Lord Chancellor by the 11 G. 4, & 1 W. 4, c. 60, s. 5, for the conveyance or transfer of property vested in persons as trustees or mortgagees who are lunatic, but not found such by inquisition, does not apply to cases in which the fact of lunacy is contested.

A TERM of 1000 years was vested in Michael Walker and another person, by way of mortgage, for securing the repayment to them of 300*l.* and interest. Subsequently to the date of the mortgage, Michael Walker was afflicted with paralysis, by which his faculties were so much impaired, that when the mortgagor became desirous of paying off the debt, it was apprehended that Michael Walker was incompetent, by reason of unsoundness of mind, to concur in re-assigning the term and giving a discharge for the money. A petition was, in consequence, presented by the mortgagor under the 5th section of the above mentioned act of parliament, upon which the usual order of reference was made. The inquiry, before the master, as to Michael Walker's alleged unsoundness of mind, was contested by his family and friends, and a great deal of conflicting evidence was adduced upon that point; the result of which was, that the master found, by his report, that Michael Walker was not a lunatic or a person of unsound mind, and therefore he did not proceed to make the other inquiries directed by the order.

It appeared, from several affidavits referred to by the master's report that the mortgagor, his solicitor, and medical adviser, had been refused access to Walker, and were consequently unable to give any evidence of his state of mind from their personal observation: but two medical witnesses who were produced and examined *viva voce* before the master on the part of Walker, \*admitted, upon their cross-examination, that his mind was [\*148] greatly impaired, that he had almost lost the power of speech, and that he was unable to write or to transact general business. One of those witnesses, however, stated that he thought Walker would be able to understand a mortgage deed, if it were laid before him and explained to him; and upon the same witness being asked by the master whether Walker was in such a state of mind as to justify his property being taken from him, or his person being put under restraint, he answered, that he did not think that he was.

After the master had made his report to the effect above mentioned, a petition was presented, in the name of Michael Walker, praying that the report might be confirmed, and that the mortgagor might be ordered to pay the

Chancery, the *cestui que trust* must pay the necessary expenses of the proceedings. *Sutphen v. Fowler*, 9 Paige, 280. See the next case; 2 Myl. & Cr. 640, n. 1.

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 1841.—In the Matter of Walker.
 

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costs of the petitioner occasioned by the order of reference, and also his costs of that application.

A cross petition was also presented by the mortgagor, praying that the report might not be confirmed, but that it might be declared that Michael Walker was a person of unsound mind and incapable by reason thereof of managing his affairs within the true intent and meaning of the statute; or that such directions as the court should think fit might be given, for the purpose of ascertaining whether he was such lunatic or person of unsound mind, and that it might be referred back to the master to review his report, and to make the further inquiries directed by the order of reference.

The petition and cross petition now came on to be heard together.

Mr. *Wigram* and Mr. *Wray*, in support of the cross petition, sub-  
 [\*149] mitted that the evidence already adduced \*before the master was sufficient to show that the party was a fit subject for a commission of lunacy, *Ridgeway v. Darwin*,<sup>(a)</sup> and consequently to justify an exercise of the summary jurisdiction given by the statute; but that if his lordship was not satisfied upon that point, they had no doubt of being able to produce still more conclusive evidence, provided they were allowed access to the party; and they suggested that his lordship should intimate his intention of declaring him to be of unsound mind, unless such access should be afforded; for that otherwise it would always be in the power of the relations of a person so circumstanced, to render the provisions of this enactment inoperative, by shutting the parties out from the means of proving the fact upon which the summary jurisdiction was founded.

[LORD CHANCELLOR:—I have no power in this proceeding to give you an opportunity of seeing the party, though I could do it in lunacy.]

Mr. *Richards* and Mr. *Simons* appeared for Michael Walker; but

THE LORD CHANCELLOR, without hearing them, said:—It never could have been intended that this act should be applied in a contested case. It would be giving me a very extensive jurisdiction: for, where there is a controversy as to the fact of lunacy, the law only pronounces a party lunatic after an investigation of the matter by a jury: whereas I am now asked to interfere with the property of this person, by a summary process, upon no better evidence than that of conflicting affidavits.[1] In such a case as this the

proper course would have been to file a bill. What I might have  
 [\*150] done if the \*party had been a mere bare trustee, and if his unsoundness of mind had been established beyond the possibility of doubt, it is unnecessary now to decide; because, so far from its being clear that this person is incompetent to deal with his property, it seems to me that the evidence, so far as it goes, rather negatives that proposition. My present im-

(a) 8 Ves. 65.

[1] The court will make no order touching the property of a lunatic, until found such by inquiry, *Ex parte Ridgway*, 5 Russ. 152; *Gillbee v. Gillbee*, 1 Phillips, 121; or, *semble*, when already party to a suit in chancery. *Ibid.* 122, n. b.



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 1841.—Strickland v. Strickland.
 

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pression, however, is, that even if the fact of unsoundness of mind were much more clearly made out than it is here, it would not be a proper exercise of my discretion, in applying the powers of this act of parliament, to treat a person as incompetent to manage his affairs, so long as he himself, or his family for him, insist that he is competent; because I am of opinion, that the act was only intended to enable parties entitled to the benefit of a legal estate to obtain it from a person in whom it is vested, and who is admitted to be incompetent to convey it, and not to involve his family in a controversy, in which they have no sort of interest, as to whether he is a lunatic or not, merely for the accommodation of third persons. The master's report must therefore be confirmed.

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The order was, that the master's report be confirmed, and that the petition of the mortgagor be dismissed with costs; and that the costs of Michael Walker, of and occasioned by the order of reference, and of the proceedings before the master consequent thereon, and the report incident thereto, and of this application, and the petition of the mortgagor and consequent thereon, be paid by the mortgagor to the solicitor for Michael Walker; such costs to be taxed by the master in case the parties should differ about the same.

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## \*STRICKLAND v. STRICKLAND.

[\*151]

1841: March 31.

The plaintiff neglected to obtain an order for a commission to examine witnesses, until after the expiration of three weeks from the time of filing the replication, when he obtained an order for that purpose, *ex parte*: Held, that the defendant's proper course was, not to move to dismiss the bill for want of prosecution, but to move to discharge the order for a commission.

THE replication in this cause was filed on the 27th of January, 1841: after which no further step was taken by the plaintiff until the 20th of February, when he served a *subpœna* to rejoin, and obtained an *ex parte* order for a commission to examine witnesses, which order, however, was not served until the 23d of February. At the next seal, the defendant moved, before the Master of the Rolls, to dismiss the bill, for want of prosecution. The motion having been refused by the Master of the Rolls, without costs, was now renewed, by way of appeal, before the Lord Chancellor; but the plaintiff had, since the notice of the appeal motion was given, obtained from the Master of the Rolls a special order, discharging the order of the 20th of February, and giving him liberty to sue out a commission for the examination of witnesses.[1]

[1] The case before the Master of the Rolls is reported, 4 Beav. 120.

1841.—Strickland v. Strickland.

Mr. Wakefield, Mr. Wigram, and Mr. Shadwell, in support of the motion.

The plaintiff, by obtaining an order for a commission, has shown that he requires a commission, and consequently that the case is within the 17th order: and as he has made default in one of the requisitions of that order, by not obtaining and serving the order for a commission within three weeks from the time of filing the replication, the defendant is entitled to have the bill dismissed, unless the court shall think fit to make a special order to the contrary; but it has been decided that the court will not make such special order unless either the plaintiff can show some special ground for indulgence, \* *Whalley v. Pepper*,<sup>(a)</sup> or the defendant shall appear to have been dilatory in his application to take advantage of the default, *Fernes v. Hutchinson*,<sup>(b)</sup> *Walmsley v. Froude*,<sup>(c)</sup> *White v. Smith*,<sup>(d)</sup> neither of which circumstances occurs in the present case.

If the present motion shall be refused, the 17th order will become, practically, a dead letter; because, until the plaintiff applies for a commission, the defendant has no means of knowing that he requires one, or, consequently, that the case is within that order:<sup>(e)</sup> and therefore, if the plaintiff's obtaining and serving an order for a commission after the expiration of the three weeks, shall be held to preclude the defendant from afterwards moving to dismiss the bill on the ground of the plaintiff's default in not obtaining and serving the order within the prescribed time, it will be impossible for the defendant to take advantage of that default at all.

Mr. Bethell appeared for the plaintiff; but

THE LORD CHANCELLOR (without hearing him) said:—The case of *White v. Smith*, so far from lending any support to this motion, assumes a doctrine in direct opposition to it. The complaint there was, that the plaintiff, who had obtained an order for a commission after the expiration of the three weeks, was not prosecuting it in the manner required by the 17th order: it being assumed that a party so obtaining a commission was bound to deal with it as subject to that order. Whereas, the argument here is, that the plaintiff is not entitled to prosecute his commission at all, and, what is more, that not having obtained the order for it until after the expiration  
[\*153] of the three weeks, he has made himself liable to have his bill dismissed. Where is it said that if a party does not obtain an order for a commission within three weeks after filing the replication, the bill shall be dismissed? When the plaintiff had allowed the three weeks to elapse, without serving the defendant with a *subpœna* to rejoin, and afterwards obtained an order for a commission, the defendant had a right to discharge it: but instead of taking any steps for that purpose, he acquiesces in the irregularity, and now even insists on that order as a ground for the present motion. It is impossible, however, in the same proceeding, to insist on

(a) 8 Sim. 203.

(b) 1 Russ. &amp; Myl. 22.

(c) 1 Russ. &amp; Myl. 334.

(d) 1 Keen, 381.

(e) See *Smith v. Oliver*, 3 Mylne & Craig, 165.

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an order, for one purpose, and to treat it as a nullity for another. If the defendant thought fit, as he has done, to submit to that order, all that the plaintiff was bound to do was to deal with it in the same manner as if it had been obtained within the three weeks. If, on the other hand, the defendant chose to dispute the order, he ought to have moved, in the regular way, to discharge it, and thenceforward the case would have stood upon the old practice, as not falling within the 17th order. But in neither alternative could the defendant have been in a situation to make this motion.

Whether what has been done, since notice of this motion was given, has been rightly done, and whether the plaintiff was entitled to the benefit of the new order for a commission, which he is said to have obtained, are questions not now before me. I only decide, that an order for a commission having been obtained after the expiration of the three weeks, and not having been discharged, the defendant is not in a situation to move to dismiss the bill.

Motion refused with costs.[1]

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\*CLARK and others v. CORT.

[\*154]

1840: December 2, 3.

Where there are cross demands between two parties of such a nature that, if both were recoverable at law, they would be the subject of legal set-off, then, if either of the demands is matter of equitable jurisdiction, the set-off will be enforced in equity.

By indentures of lease and release, dated the 18th and 19th of August, 1837, and made between Samuel Grocock of the one part, and several persons who then constituted the banking firm of Mansfield & Co. of the other part, certain real estates were conveyed to trustees, upon trust to sell, and to apply the proceeds, after discharging several prior incumbrances, in payment of what was then due or might thereafter become due from Grocock upon his banking account, to the persons who, for the time being, should constitute the firm of Mansfield & Co., or carry on the business of that firm. In the month of July, 1839, the persons then representing the firm having agreed to make over the business to the plaintiffs, executed an indenture, by which they assigned to them all the joint property and effects of the firm, including a considerable balance then due from Grocock upon his banking account, together with the benefit of the indentures of the 18th and 19th of August, 1837, for securing such balance.

By virtue of that assignment, the plaintiffs entered upon the business, as successors of the firm of Mansfield & Co., but no transaction took place between them and Grocock subsequently to the assignment, in continuation

[1] *Morison v. Morison*, 4 Myl. & Cr. 215, 227. *Cowman v. Lovett*, 10 Paige, 559. 1 Russ. & M. 24, n. 1.

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of his banking account, nor did it appear that Grocock ever recognized the plaintiffs as his creditors, or that he received any actual notice of the assignment: but between the months of August and December, 1839, he was employed by the plaintiffs, as a builder, in making various repairs and [\*155] alterations in their banking \*house, in respect of which they became indebted to him in a considerable sum of money.

On the 17th of December, 1839, Grocock became bankrupt, and the defendant Cort and three others of the defendants having been chosen assignees of his estate and effects, they brought an action, in that character, against the plaintiffs, for the amount due from the latter to Grocock as above mentioned; whereupon the bill in this cause was filed against the assignees and the surviving partner of the firm of Mansfield & Co., alleging, that since the bankruptcy of Grocock, the plaintiffs had caused all the premises comprised in the indenture of the 19th of August, 1837, to be sold, and had received the proceeds of the sale; but that the accounts between Grocock or his assignees and the several persons having mortgages or charges upon the premises prior to the indenture of the 19th of August, 1837, were in an unsettled state, and that the plaintiffs were unable to ascertain how much was due to such several persons upon their respective securities, or what would be the amount of the surplus of the moneys arising from the sale of the mortgaged premises, applicable to the discharge of the balance due from Grocock. The bill, however, alleged, and it was admitted by the answer of the defendants, the assignees, that after duly applying the proceeds of the mortgaged premises, there would remain due to the plaintiffs from Grocock or his estate, in respect of the balance of his banking account, a sum exceeding the amount for which the action was brought. The defendants, however, said that they knew not what was the precise amount due from Grocock's estate to the plaintiffs on the banking account.

The bill prayed that it might be declared that the amount so due [\*156] from the plaintiffs to the estate of \*Grocock together with the costs of the action, ought to be set off, *pro tanto*, against the amount due from Grocock or his estate on the balance of his banking account; and it also prayed that an account might be taken of what was due from Grocock to the plaintiffs in respect of such balance, and that the defendants, the assignees, might be restrained from all further proceedings in the action; but it did not pray payment or satisfaction of what should be found due upon taking the account.

The plaintiffs having obtained the common injunction, the defendants, the assignees, put in their answer, and moved, before the Vice-Chancellor, to dissolve the injunction: and his honor granted the motion. The plaintiffs now moved, by way of appeal, before the Lord Chancellor, to discharge the Vice-Chancellor's order, and to revive the injunction.

Mr. *Knight Bruce*, Mr. *Wigram*, and Mr. *James Parker*, in support of the appeal motion.—The Vice-Chancellor dissolved the injunction on the

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ground that the plaintiffs' demand was founded, not upon an equitable debt, but upon an assignment of a legal debt. But we submit that there is no foundation for such a distinction, and that in order to establish a right of equitable set-off, it is sufficient to show, as is done here, that there are cross demands between the parties, which, but for their equitable nature, might be set off at law; *Whyte v. O'Brien*,<sup>(a)</sup> *Wake v. Tinkler*,<sup>(b)</sup> *Tucker v. Tucker*.<sup>(c)</sup>

\*Mr. Stuart and Mr. W. T. S. Daniel, contra.—The Vice-Chancellor's order may be supported upon various grounds. First, there is no equity in the bill, independent of the claim of set-off; for the assignee of a legal debt cannot sue for it in this court, unless the assignor refuse to allow the action to be brought in his name; *Hammond v. Messenger*; <sup>(d)</sup> and no such impediment is alleged to exist in this case; so that this is an attempt to obtain the benefit of a set-off in equity, upon the sole ground that it cannot be obtained at law; a ground clearly insufficient; *Ex parte Flint*.<sup>(e)</sup>

Secondly, the debts in question are due to and from the plaintiffs in different rights; their demand against the bankrupt being claimed by them in their character of assignees from the original creditor; and for that reason, if for no other, these demands cannot be set off against each other; *Bishop v. Church*,<sup>(g)</sup> *Medlicot v. Bowes*,<sup>(h)</sup> *Gale v. Luttrell*.<sup>(i)</sup> In addition to which, mutual debts, to be the subject of set-off, whether at law or in equity, must be such as imply, at least, mutuality of contract, and therefore the want of notice of the assignment to the bankrupt before the bankruptcy is no less fatal to the right of set-off in equity than it would be at law; *Ex parte South*.<sup>(k)</sup> If, however, the plaintiffs are really entitled to the benefit of set-off, they might have obtained it in the bankruptcy, which is the appropriate jurisdiction in such cases, and in which the whole of the relief, which is sought by this bill, might have been administered as effectually and more expeditiously than it can be in this court.

\*Mr. Knight Bruce, in reply.—The cases referred to, in which a set-off has been refused on the ground of the demands being due in different rights, were all cases in which the effect of allowing a set-off would have been to pay one person's debt with the money of another, and therefore those cases have no application to the present. And as to the objection that mutual debts are not the subjects of set-off, unless they imply mutuality of contract; the answer is, that the right of set-off exists, not by contract, but by operation of law, arising out of the relation of debtor and creditor subsisting on both sides; and, accordingly, it has been held,<sup>(l)</sup> that when a person having a legal demand against another, gives his promissory note to a third party, which, by negotiation comes to the hands of the debtor, the one debt

(a) 1 S. & S. 551.

(b) 16 East, 36.

(c) 4 Barn. & Adol. 745.

(d) 9 Sim. 327.

(e) 1 Swanst. 30, see p. 33.

(g) 3 Atk. 691.

(h) 1 Ves. sen. 207.

(i) 1 Y. & J. 180.

(k) 3 Swanst. 393.

(l) See *Hankey v. Smith*, 3 Term Rep. 507, note.

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is subject to be set off against the other ; and yet, so far as regards mutuality of contract, there is no difference between such a case as that and the present.

With respect to the jurisdiction, the plaintiffs may have had very good reasons for not wishing to proceed under the bankruptcy. They may have had liens, the benefit of which they would have lost by so doing. Assuming, however, that the jurisdiction in bankruptcy would have answered their purpose equally well, that would form no objection to this bill, because this court has an inherent jurisdiction in cases of set-off, independent of the statutes. *Ex parte Stephens*.(a) And the books abound with instances in which the court has applied that jurisdiction to cases falling within [\*159] the principle of the statutes, but in which courts of law, from their peculiar doctrines and rules of procedure, are unable to administer such relief. *Ryall v. Rowles*,(b) *Ranking v. Barnard*.(c)

**Dec. 3 :—THE LORD CHANCELLOR.**—The deed of 1837 provided for the past and future transactions and dealings of Grocock and Mansfield & Company ; and it provided that it should enure, as a security, to whomsoever should carry on the business of Mansfield & Company, for the payment of all moneys due in respect of such transactions. The plaintiffs are now the persons filling that situation ; they are therefore not merely assignees of a legal debt without the privity of the debtor, but they are assignees of the debt for whom the debtor contracted that the security should enure.

The property has been sold, and the amount of debt, the result of the transactions and dealings, is admitted to be unascertained. The plaintiffs therefore are, as assignees of this debt, and by contract, entitled to what is so due, and to the application of the proceeds of the property in part payment.

The case, then, is not that of a mere assignee of a legal debt coming into equity to have the benefit of a set-off, which he could not have at law. It is, therefore, not necessary to decide what the court would do in such a case, though the decision in *Williams v. Davis*,(d) goes much further than such a case would require.

If the security had been more than sufficient to pay the debt, no [\*160] question could have been made, but that the plaintiffs would have had a right to come to this court to have the amount ascertained, and to have the debt liquidated by the application of the property charged. The jurisdiction cannot be affected by the amount of the security.

As equity recognizes the assignee of a debt as the creditor, and as these demands, if both were recoverable at law, would be the subject of set-off ; so, if equity has jurisdiction of the subject matter, it will enforce the set-off.

The plaintiffs had a demand against Grocock before he became bankrupt,

(a) 11 Ves. 24 ; see p. 27.

(b) 1 Ves. sen. 374.

(c) 5 Madd. 32 ; and see *James v. Kynnier*, 5 Ves. 108 ; *Bradley v. Millar*, 1 Rose, 273.

(d) 2 Simons, 461.



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in respect of which they are entitled to sue in this court ; they, therefore, in this court, are entitled to set off the legal debt which they owe to Grocock ; and such was the case of *O'Conner v. Spaight*.<sup>(a)</sup> The relative position of the parties was established before the bankruptcy ; that event, therefore, does not affect the question ; and, for the reasons I have given, I am of opinion that the plaintiffs are entitled to the benefit of the set-off in equity to which, if they had been the original creditors, instead of the assignees of the debt, they would have been entitled at law. The injunction must be continued.<sup>(b)</sup>[2]

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\**RAWSON and another v. SAMUEL*. [1]

[\*161]

1839 : February 23, 27. 1840 : November 19, 20. 1841 : January 23 ; April 15.

Where cross demands exist between two parties, one of whom is proceeding by an action at law, and the other by a suit in equity for an account and payment, the court of equity, although it may be of opinion that the facts of the case entitle the plaintiff in equity to have one demand set off against the other, will not give that relief, unless it has been distinctly prayed by the bill.

Equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient. Still less will the court interfere, on the ground of equitable set-off, to prevent a party from recovering a sum awarded to him by a jury as damages for a breach of contract, merely because there is an unsettled account pending between him and the party against whom the action is brought, although the subject matter of the account consist of dealings and transactions arising out of the contract, the breach of which is the subject of the action.

Principle upon which the court acts in advancing causes.

In the month of January, 1835, an agreement was entered into between the plaintiffs, who carried on business in London, under the firm of Rawson, Norton & Co., and the defendant, who was a merchant at Glasgow, the details of which were matter of dispute between the parties, being partly expressed in a written memorandum, and partly to be collected from certain previous transactions between the same parties, which were referred to in that document. The outline, however, of the agreement, upon which there was no dispute, was, that the defendant should make consignments of goods, on his own account and risk, to certain mercantile houses in the East Indies, in which the plaintiff Rawson was interested ; and that, upon the shipment of every cargo of goods which he should so consign, he should be at liberty to draw bills of exchange, at six or twelve months, upon the plaintiffs, for the amount of his charges and disbursements in respect of such shipments, in-

(a) 1 Sch. & Lef. 305.

(b) See the case of *Rawson v. Samuel*, *infra*.

[2] *Cherry v. Boulton*, 4 Myl. & Cr. 442. *Gay v. Gay*, 10 Paige, 369. 2 Story's Eq. § 1436, 1436 a. 1 Sim. & Sta. 551, n. 1. 2 Sim. 463, n. 1. Post, 181, n. 4.

[1] S. C. but on different points, 9 Sim. 442 ; 4 Myl. & Cr. 330.

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cluding a commission of five per cent.; that the goods should be sold by the foreign houses, according to their own discretion, at a certain rate of commission; and that the proceeds of such sales should be remitted, in the first instance, to the plaintiffs, for their indemnity against the amount of their acceptances.

[\*162] \*In pursuance of that agreement, consignments of goods to a very large amount were made by the defendant to the foreign houses referred to, during the years 1835 and 1836, against which bills of exchange were, from time to time, drawn by him upon the plaintiffs. All the bills so drawn which were presented previously to the month of January, 1837, were duly accepted; but several bills, to the amount of upwards of 20,000*l.*, which had been drawn by the defendant upon the plaintiffs in respect of certain shipments made by him in and subsequently to the month of August, 1836, upon being presented to the plaintiffs in the month of January, 1837, for acceptance, were dishonored; and thereupon the defendant brought an action against the plaintiffs for an alleged breach of the agreement, in which he laid the damages at 30,000*l.*

Upon that action being brought, the plaintiffs filed the bill in this cause, in which, after setting forth the memorandum of agreement, and stating the previous transactions therein referred to, they alleged that it was one of the terms of the agreement that the goods should be invoiced at their actual cost prices, and that the sums for which the bills were to be drawn should be the amounts of such invoices, with no other addition than the actual charges of shipment and a commission of five per cent.; and that it was also part of the agreement that the bills should be renewed by the defendant in case the plaintiffs should so require; and that the goods to be shipped by the defendant should, upon reaching their destination, be sold forthwith by the foreign houses, and that the proceeds should be remitted in such a manner as that the plaintiffs might never be obliged to come under any actual cash advance upon their acceptances. The bill then alleged that the bills which

[\*163] the plaintiffs had accepted under the \*agreement had been so accepted on the faith and assurance that, before they became due, the returns from the sales of the goods against which they were respectively drawn would have come in; but that, in consequence of the defendant's having fraudulently charged the goods in the invoices above their actual cost prices, and also of his having, by various means, evaded renewing the bills, and of his having, in contravention of the agreement, sent out private instructions to the foreign houses, by which the sales of the goods had been delayed until the markets had fallen, a considerable portion of the goods were, in the month of January, 1837, still unsold, while the plaintiffs had, at the same time, come under large cash advances, for which the goods so remaining unsold were a very inadequate security; and that it was under these circumstances that they had refused to accept the additional bills which were then presented to them.

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In fact the bill alleged that at the time when the plaintiffs refused to accept the bills in question, they were under an actual cash advance of 53,000*l.* and upwards, and that they were liable upon bills which they had previously accepted, and which were then running, to a still greater amount; and that the total amount of such advances and liabilities at that time greatly exceeded the value of the goods then remaining unsold, including the shipments in and subsequent to the month of August, 1837.

The bill then set forth the substance of the declaration filed in the action, and of the pleas which the plaintiffs had put in to it, two of which it stated to be to the following effect:—first, that it was a condition of the agreement that the plaintiffs should not be required to accept any bills while there should be a balance due \*to them for payments made on ac- [\*164] count of former acceptances, after giving credit for all returns; and that there was such balance still due: and 2dly, that the defendant had charged the invoices of the shipments above the market price, and that the plaintiffs had thus given credit, and were in advance for the credit so given to a large excess, beyond the total amount for which, according to the agreement, they were liable to have given credit in respect of such shipments; and that the amount so overdrawn exceeded the amount for which the bills in question were drawn.

The bill then charged that the defendant had in fact, before the month of January, 1837, in divers particulars fraudulently broken the agreement, or failed to perform it on his part; and that he had also, by divers false representations, prevailed upon the plaintiffs to make advances to him, under the agreement, to an amount considerably beyond the value of the goods shipped by him; and that so it would appear, if the defendant would answer and set forth the several matters thereafter charged and inquired after. Then followed a long series of special charges in relation to the actual cost prices of the goods which had been shipped, and to the prices at which they had been invoiced: after which the bill proceeded to charge, that if the defendant would set forth a full and true account of the dealings and transactions which had taken place between him and the plaintiffs under the agreement, and if an account thereof were taken under the direction of the court, it would appear that, at the time when the plaintiffs refused to accept the bills in question, the defendant was indebted to them, in respect of such dealings and transactions, to an amount greatly exceeding the value of any goods which had been shipped by the defendant, and the proceeds of which were then coming \*to the plaintiffs; and that after giving credit to the de- [\*165] fendant for all sums which the plaintiffs had received since their refusal to accept those bills, there still remained due to them from the defendant a very large sum: and the bill charged, that it would also appear from such account, if so taken, that the plaintiffs were fully justified in not accepting the bills.

The bill then charged, that the defendant was residing at Glasgow, out of

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the jurisdiction of the court, and that he had become so much embarrassed in his circumstances as to have been obliged to suspend the payment of his debts.

The prayer of the bill was, that an account might be taken under the direction of the court of the dealings and transactions between the plaintiffs and the defendant; and that the defendant might be decreed to pay to the plaintiffs what might appear due from him to them, they being willing to pay what, if any thing, should appear to be due from them to him; and that the defendant might make a full discovery of the matters inquired after by the bill, and that the plaintiffs might have the benefit of such discovery at the trial of the action: and that the defendant might, in the meantime, be restrained, by injunction, from proceeding in his action, and from commencing or prosecuting any other action or actions, and from in any other manner proceeding at law against the plaintiffs, touching the matters in question.

The defendant, by his answer, stated what he understood to have been the true intent and meaning of the agreement, both with reference to the prices at which the goods were to be invoiced, and to the renewal of the

bills, in both which particulars his view of the agreement differed [\*166] from that insisted upon by the bill; and he denied that the agree-

ment, as he so explained and understood it, had been broken by him in either of those particulars, or in any other respect. He also denied having sent out any instructions to the foreign houses respecting the sales of the goods, further than by giving them a general caution not to make precipitate sales in an unfavorable state of the market. With respect to the accounts, the defendant stated, that he had, from time to time, since the month of January, 1835, received from the plaintiffs statements purporting to be accounts of the net proceeds of the remittances from the foreign houses; and he admitted that it did appear from their statements of accounts that the plaintiffs had, in and previously to the month of January, 1837, come under an actual cash advance of 53,000*l.* and upwards; but he said that those statements of accounts had not been vouched, and that he had from time to time objected, and did still object, to many parts of them; and that if such objections should be allowed, as he believed they ought to be, the amount of that apparent advance would be greatly reduced; he insisted, however, that it was no part of the agreement that the plaintiffs should not be bound to accept more bills so long as they should be under a cash advance upon previous acceptances, and consequently that the state of the account in the month of January, 1837, whatever it might have been, could not relieve the plaintiffs from their obligation to accept the bills in question: accordingly, he said, that in the pleadings at law no issue was tendered by him in respect of the balance alleged to have been due to the plaintiffs in the month of January, 1837, but that, for the purposes of that action, it was admitted on his part, that a balance was due from him to the plaintiffs at the time of their refusal to accept those bills.

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\*The defendant then stated his belief, that if all the goods shipped [\*167] by him, and for the amount of which the plaintiffs had accepted bills, were realized, and the proceeds thereof remitted, and if the accounts were to be fairly and properly taken, such remittances would be found more than sufficient to cover the amount of the plaintiffs' advances. He then admitted, that he had become embarrassed in his circumstances, and that he had been obliged to suspend the payment of his debts; but he stated, that such embarrassment was wholly occasioned by the plaintiffs having refused to accept the bills in question according to their agreement.

Before the answer was put in, the plaintiffs obtained the common injunction, which was afterwards extended to stay trial. On the coming in of the answer, the defendant moved, before the Vice-Chancellor, to dissolve the injunction; upon which motion his honor ordered that the injunction should be dissolved so far as it stayed the trial of the action, and that in other respects it should be continued.

From that order both parties appealed to the Lord Chancellor: the plaintiffs, by a motion that so much of the Vice-Chancellor's order as directed that the injunction should be dissolved so far as it stayed the trial might be discharged; the defendant, by a motion that the order, so far as it stayed execution in the action, might be discharged, and that the plaintiffs at law might be at liberty to sign judgment, and issue execution in the action in due course.

*Feb. 23, 27.*—The two appeal motions were heard together.

Mr. *Wigram* and Mr. *Hull*, who appeared for the defendant, and began, contended that the plaintiffs \*having obtained all the discovery [\*168] that was material to their defence at law, there was no longer any reason for staying the trial of the action, and that, so far, the Vice-Chancellor's order was right; but they said that the rest of his honor's order had proceeded upon a supposed right in the plaintiff to set off the amount of damages which would be recovered in the action against the balance of the account in equity, whereas those two demands, even supposing the balance to be in favor of the plaintiffs, which was not admitted to be the case, were not so connected together as to be the subjects of set-off; and that even if they were, the bill was not properly framed with a view to such relief; and, therefore, they contended that the injunction ought to have been dissolved altogether.

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Blunt*, for the plaintiffs, argued that the Vice-Chancellor's order, so far as it continued the injunction, was right, both with reference to the frame of the bill and to the merits of the case. The argument on the merits was repeated in greater detail on a subsequent motion, which will be found, in its place, in this report. With respect to the rest of the order, they referred to the issues tendered by the two pleas above mentioned, as showing that the fraudulent practices with which the defendant was charged by the bill, and upon which the plaintiffs relied



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for their defence to the action, were inseparably connected with the subject matter of the account; upon which ground they contended, that the trial of the action ought to be postponed until the account should have been taken.

**THE LORD CHANCELLOR :—**With respect to that part of the Vice-Chancellor's order which allows the action to proceed to trial, I am clearly [\*169] of opinion that it was right. The action is for an alleged breach of the contract by the defendants at law in refusing to accept bills, under circumstances, as to which it is a question in the action whether those circumstances did or did not justify the refusal to accept the bills. The suit in equity is for the purpose of having the account taken under the agreement, so long as it subsisted between the parties; and also for the purpose of obtaining discovery in aid of the plaintiffs' defence to the action. The plaintiffs were undoubtedly entitled to such discovery; and so long as that discovery was incomplete, it was right that the trial should be stayed. But now; instead of being a matter of discovery, the application is, that the trial of the action may be postponed until the account itself shall have been taken: and for the purpose of showing that there is some equity to suspend the trial, two of the pleas, and two only, have been referred to. The first is that which alleges that the plaintiffs were not bound to accept bills when the balance was against them, and that there was such balance still due. Now, upon that plea, the issue denies that it was part of the contract that the liability to accept should be limited to the cases in which the balance was in favor of the plaintiffs. It is quite clear that the account has nothing to do with that. The next plea is that in which it is pleaded, that the defendant charged higher prices for the goods than he ought to have charged under the agreement; and that, by so doing, he obtained, from the plaintiffs, acceptances for a larger sum than by the contract he was entitled to ask for. If that be proved, and be an answer to the action, it must be so independently of the result of the account, which therefore cannot possibly be material to the trial of that issue. Then why is this court to interfere with the trial of the action? This court has no jurisdiction over the subject [\*170] matter of the action: it cannot try the damage sustained by the breach of the contract: that must, at some time, in some shape or other, become the subject of investigation at law; and the answer being sufficient, the parties have now got all the discovery they can get from their opponents: the discovery is now complete. Not only, therefore, do I not see any reason for interfering with the trial, but I do not see what right the court has to interfere with it, or what jurisdiction it has to prevent a party, who claims a right to damages for a breach of contract, from proceeding to establish that claim in the only way in which it can be established, namely, by an investigation before a jury.[2]

It is quite a different question, whether the court will allow the defendant

[2] *Bernard v. Wallis*, ante, 85, 90.



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1839.—*Rawson v. Samuel.*

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in the event of his succeeding in that action, to receive the fruits of it; that is to say, whether it will not interfere for the purpose of preventing him from compelling payment of the damages, if any, which he may recover in the action, while he leaves unpaid the balance which, on taking the account, shall be found due from him to the plaintiffs. Upon that question, however, I do not feel that, in the present state of this record, I ought to express any opinion; because it would be administering an equity between the parties, not as matter of account, but as matter of set-off, between the balance of the account coming to the plaintiffs, and the damages which may be recovered in the action by the defendant. If such an equity exists, it will be to be administered by the court in a suit containing, at least, allegations and a prayer adapted to such relief. Not only, however, is no such case stated or alluded to upon this record, but I find a relief prayed for, which is totally inconsistent with any such equity being administered in this suit; for the bill prays, that an account may be \*taken of the dealings and trans- [\*171] actions between the plaintiffs and the defendant, and that the defendant may be decreed to pay to the plaintiffs what shall appear to be due to them upon taking such account, the plaintiffs being ready and willing to pay what, if any thing, shall appear to be due from them to the defendant: whereas the relief applicable to the case now made at the bar would be, not that the defendant might pay the plaintiffs the balance, but that the balance might go and be applied in satisfaction of the damages, if any, which the defendant would otherwise be entitled to receive.

The bill then goes on to pray, that the defendant may make a full discovery, and that the plaintiffs may have the benefit of such discovery at the trial of the action; and that the defendant may, in the meantime, be restrained by injunction from proceeding in his said action, and from commencing or proceeding in any other action, and from in any other manner proceeding at law against the defendant. That is the ordinary language of a bill of discovery, and is not the form of a proceeding where the plaintiff thinks he has established a case which is not to be disposed of by an action at law, but is to form a matter of equitable adjudication. The words "in the meantime" are clearly to be referred to the last antecedent, which is, that the defendant may make discovery, and that the plaintiffs may have the benefit of it upon the trial of the action.

Being, therefore, of opinion, as I have already said, that there is no case made for restraining the trial of the action, and there being, according to the view I take of the bill, no injunction prayed against the execution, the injunction must be dissolved altogether; but let it be understood, that so far as it restrains execution, I \*dissolve it entirely on the frame of [172] the bill, and that I express no opinion upon the merits.

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1840: Nov. 19, 20.—The bill was then amended, and charges were introduced, (amongst others,) to the effect, that, both at the time when the bills in

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1840.—*Rawson v. Samuel*.

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question were dishonored, and at the time when the action was commenced, there was due to the plaintiffs, on the balance of their accounts with the defendant under the agreement, a sum much greater than the amount of the bills in question, and also much greater than the sum of 30,000*l.*, at which the damages were laid in the action; and that, under those circumstances the defendant ought to be restrained from proceeding to trial in the action; or, at all events, from enforcing payment against the plaintiffs of the amount, if any, which he might recover in such action, until the accounts should have been taken; and that the plaintiffs ought to be allowed to set off the amount which, on the balance of such accounts, might be found due to them, against any sum which the defendant might recover in such action.

The prayer of the bill, as amended, was, that the account might be taken, as before prayed, and that, in the meantime, the defendant might be restrained from proceeding to trial, or, at all events, to execution in the action; and that it might be declared that the plaintiffs were entitled to set off, against the amount which might be recovered by the defendant in the action, the amount which, upon taking the account, should be found due from him to the plaintiffs; the plaintiffs being willing and thereby offering to pay the difference, if any, which there might be between the amount so to be [\*173] recovered by the defendant and the balance which should be \*found due to the plaintiffs on such account, in case such balance should fall short of the amount so to be recovered.

On the coming in of the answer to the amended bill, which did not materially differ from the former one, the Vice-Chancellor, upon the motion of the plaintiffs, granted an injunction to restrain execution in the action until the further order of the court.

The defendant now moved, before the Lord Chancellor, that that order might be discharged.

Mr. *Wigram* and Mr. *Hull*, for the defendant.—The right of set-off exists only between demands connected together in their nature or by contract; whereas the defendant's right to damages in this action is wholly collateral to the account which is sought by the bill. Besides which, the injury of which the defendant complains is not merely that his bills have not been accepted, but that they have not been accepted at the time when they ought to have been accepted. As time is of the essence of the injury, so it must be of the damages which are to be assessed by the jury; whereas the effect of the Vice-Chancellor's order is to say that if a jury shall find that 30,000*l.*, paid now, is only an equivalent for the damage which the defendant has sustained by not having bills accepted a year ago, this court will alter that verdict by postponing the payment of the 30,000*l.* until after the accounts shall have been taken.

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Blunt*, for the plaintiffs.—It is not correct to say that the subject matters of the action and of the [\*174] suit are collateral to each other; \*for not only do both of them arise

1840.—*Rawson v. Samuel.*

out of the same transaction, but the one is connected with and dependent on the other, inasmuch as the propriety or impropriety of the plaintiffs' refusal to accept the bills, and consequently the amount of damages to which the defendant is entitled, supposing a breach of the contract to have been committed, will materially depend upon the state of the account, at the time when such refusal took place. Nor is it any objection to the claim of set-off in equity, that one of the demands is founded in tort, and the other in contract; because, when once a judgment is recovered, in an action for damages, the amount of such damages constitutes a mere civil demand, although the ground of the judgment was a tort. Accordingly, this court, which looks to the substance of the demands, and not to the technical distinctions which exist in courts of law between the different forms of action, has, in numerous instances, given relief, by way of set-off, between the damages recovered by one party at law, and a debt claimed by the other in equity; *Beasley v. D'Arcy*,<sup>(a)</sup> *Piggott v. Williams*,<sup>(b)</sup> *Lord Cawdor v. Lewis*,<sup>(c)</sup> *Williams v. Davies*.<sup>(d)</sup>

In this case, the circumstance of the defendant's being out of the jurisdiction, which is not denied by the answer, and of his insolvency, which is admitted, furnish additional reasons why the court should afford this species of relief. For, if the defendant be allowed to recover damages in the action, and the result of the account turn out in favor of the plaintiffs, the court will have lost the power of doing justice between the parties. Whereas, if the injunction be continued, the court will be able to secure the amount of damages, if any shall be recovered, to await the result of the [\*175] account.

THE LORD CHANCELLOR intimated to the defendant's counsel, that it was unnecessary for him to address himself, in his reply, to the circumstances of the defendant's being out of the jurisdiction, and insolvent, inasmuch as those circumstances could give the plaintiffs no equity.[3]

Mr. Wigram, in reply.—After what your lordship has said, the dry question of equitable set-off is the only one with which it is necessary to deal; and with respect to that, the whole of the argument on the other side proceeds upon a confusion between cases of set-off and cases of security or lien. All the authorities which have been cited, except that of *Williams v. Davies*, are of the latter description. In *Beasley v. D'Arcy*, the injury, for which damages were claimed by the tenant, was an injury to the thing out of which the landlord's rent was to come; and, as the injury was committed by the landlord himself, it was reasonable that the amount of damages for it

(a) 2 Sch. & Lef. 403, n. (b) 6 Mad. 95. (c) 1 Y. & Coll. 427. (d) 2 Sim. 461.

[3] The mere fact of the residence of a party abroad, is not a ground for the interference of the court to enforce a set-off against him. *Murray v. Tolland*, 3 Johns. Ch. Rep. 577, 578. Whether insolvency of a party against whom a set-off is claimed, is a ground for the exercise of the jurisdiction of the court; see *Gay v. Gay*, 10 Paige, 376; *Simson v. Hart*, 14 Johns. Rep. 63; 2 Story's Eq. § 1436, n. 1; *Howe v. Sheppard*, 2 Sumn. 415; *Gordon v. Lewis*, id. 634.

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1840.—*Rawson v. Samuel.*


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should be deducted from the amount of rent which he was entitled to recover. So also in *Piggott v. Williams*, the subject matter of the solicitor's claim being compensation for his professional services, it was right that the damages, which his client had sustained from his negligent discharge of those services, should be brought into the account, and deducted from the amount of his claim. In the case of *Lord Cawdor v. Lewis*, the plaintiff claimed an equitable lien upon the land in question, and consequently upon the *mesne* profits of it, which were the subject matter of the defendant's action. That, therefore, was not a case of set-off, properly speaking, [\*176] but of lien. With respect to *William v. Davies*, it is \*one of those extreme cases which answer themselves: for if that decision be correct, this court might interfere by injunction to restrain a party from recovering damages for an assault or any other personal injury, in any case, in which he might happen to be indebted to the other party on the balance of an account. In the present case, however, there is not even an admission that the balance of the account is in favor of the plaintiffs; on the contrary, the defendant states his belief (which is all that can be expected from him, considering that his only means of information are in the hands of the plaintiffs) that if the accounts were properly taken, a balance would be coming to himself.

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1841: *Jan. 25.*—THE LORD CHANCELLOR:—The mercantile arrangement between the plaintiffs and the defendant, which has led to the existing litigation both at law and equity between them, was, so far as regards the question before me, shortly this:—

The defendant Samuel was to send out goods to several houses in distant ports connected with the plaintiffs' house in this country, who were to sell, and remit the proceeds to the plaintiffs, and they were to accept bills to be drawn upon them by the defendant, upon the shipments taking place. The result was, that the plaintiffs became largely in advance, the bills becoming due, and being paid by them, before remittances or consignments were received from abroad to meet them. The plaintiffs allege that this arose, in a great degree, from the misconduct of the defendant in drawing bills upon them for larger sums than the value of the goods shipped justified, and in directing the houses abroad not to sell, and in refusing to renew the [\*177] bills: but, however that may turn out in the progress of \*the cause, I do not find in the answer any admissions which can, upon this motion, enable the plaintiffs to proceed upon the ground that any of those allegations are so established as to entitle them to any order founded upon their being true: but it is admitted that there is a complicated account to be taken between the plaintiffs and the defendant, upon the result of which, however, the defendant says he believes that a balance will be found due to him.

The subject of the action at law is the refusal of the plaintiffs in equity to

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 1841.—*Rawson v. Samuel*.
 

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accept bills drawn by the defendant, in pursuance of the agreement, upon certain shipments made to the houses abroad. The Vice-Chancellor's order permits the trial of this action, but restrains the execution, in case a verdict should be found for the plaintiffs at law. The case, therefore, to be considered, is the plaintiffs' recovering a verdict; that is to say, the case of the plaintiffs in equity having broken their contract, and improperly refused to accept the bills; and the question is, whether the defendant in equity, having obtained a verdict, as compensation for such a breach of contract and consequential injury, ought to be restrained from receiving the sum so awarded to him, until the complicated account stated in the bill shall have been taken, and the balance ascertained. This would produce the most obvious injustice, if the balance should be found in favor of the plaintiff at law, which he has sworn he believes it will; but whatever weight may be attached to this statement of belief as to the probable balance of a long and complicated account, the case is certainly not one in which the plaintiffs in equity can ask the court to assume that the balance will be in their favor. The equity, therefore, must rest upon the admitted evidence of a complicated and unsettled account.

\*It was said that the subjects of the suit in this court, and of the [\*178] action at law, arise out of the same contract; but the one is for an account of transactions under the contract, and the other for damages for the breach of it. The object and subject matters are, therefore, totally distinct; and the fact that the agreement was the origin of both does not form any bond of union for the purpose of supporting an injunction.

The question then comes to this: Is the defendant, in a suit in this court for an account, the balance of which I will suppose to be uncertain, to be restrained from taking out execution in an action for damages against the other party to the account, until after the account shall have been taken, and it shall thereby have been ascertained that he does not owe to the defendant at law, upon the balance of the account, a sum equal to the amount of the damages? If so, it cannot be upon the ground of set-off, because there is not at present any balance against which the damages can be set off; nor can it be because the damages are involved in the account, for certainly they can form no part of it.

We speak familiarly of equitable set-off, as distinguished from the set-off at law; but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient; *White v. O'Brien*; (a) although it is difficult to find any other ground for the order in *Williams v. Davies*, (b) as reported. In the present case, there are not even cross demands, as it cannot be assumed that the balance of the account will be found to \*be in fa- [\*179]

(a) 1 S. &amp; S. 551.

(b) 2 Sim. 461.



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 1841.—*Rawson v. Samuel*.
 

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vor of the defendants at law. Is there, then, any equity in preventing a party who has recovered damages at law from receiving them, because he may be found to be indebted, upon the balance of an unsettled account, to the party against whom the damages have been recovered? Suppose the balance should be found to be due to the plaintiff at law, what compensation can be made to him for the injury he must have sustained by the delay? The jury assess the damages as the compensation due at the time of their verdict. Their verdict may be no compensation for the additional injury which the delay in payment may occasion. What equity have the plaintiffs in the suit for an account to be protected against the damages awarded against them? If they have no such equity, there can be no good ground for the injunction.

Several cases were cited in support of the injunction; but in every one of them, except *Williams v. Davies*, it will be found that the equity of the bill impeached the title to the legal demand. In *Beasley v. D'Arcy*,<sup>(a)</sup> the tenant was entitled to redeem his lease upon payment of the rent due; and in ascertaining the amount of such rent, a sum was deducted which was due to the tenant from the landlord for damage done in cutting timber. Both were ascertained sums, and the equity against the landlord was that he ought not to recover possession of the farm for non-payment of rent, whilst he owed to the tenant a sum for damage to that same farm. In *O'Connor v. Spaight*,<sup>(b)</sup> the rent paid formed part of a complicated account; and it was impossible, without taking the account, to ascertain what sum the tenant was [\*180] to pay to redeem his lease. In *Ex parte Stephens*,<sup>(c)</sup> the term equitable set-off is used; but the note having been given under a misrepresentation, and a concealment of the fact that the party to whom it was given was at the time largely indebted to the party who gave it, the note was ordered to be delivered up as paid. In *Piggott v. Williams*,<sup>(d)</sup> the complaint against the solicitor for negligence went directly to impeach the demand he was attempting to enforce. In *Lord Cawdor v. Lewis*,<sup>(e)</sup> the proposition is too largely stated in the marginal note; for, in the case, the action for mesne profits was brought against the plaintiff, who was held, as against the defendant, to be, in equity, entitled to the land. None of these cases furnish any grounds for the injunction in the case before me.

In *Preston v. Strutton*,<sup>(g)</sup> the pendency of an unsettled partnership account, upon which the balance was in dispute, was held to be no ground for an injunction to restrain execution upon a judgment which had been obtained upon a note given for a balance upon a former settlement.

When this case was before me, in 1838, as reported in 8 Law Journal, 75, the plaintiffs had not had all the discovery they required. I am there reported to have said "The court must be satisfied how the evidence stands, as applicable to the points stated in the bill, before it can safely dispose of the

(a) 2 Sch. &amp; Lef. 403, n.

(b) 1 Sch. &amp; Lef. 305.

(c) 11 Ves. 24.

(d) 6 Mad. 95.

(e) 1 Y. &amp; Coll. 427.

(g) 1 Anstr. 50.



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 1841.—*Rawson v. Samuel*.
 

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question whether the action shall proceed ; all of which will be open to the court when it is satisfied that the plaintiffs have had the opportunity of investigation which they ask. If they find nothing to bear on the issue, the result will be accordingly." It never occurred to me, that if the plaintiffs \*were not able, from admissions in the answer, or from [\*181] documents produced by the defendant, to establish, for the purpose of the injunction, the case made by the bill, they could sustain it by the mere fact of the pendency of the account. The case, however, is now reduced to that, and that will not, I think, justify the order appealed from ; which must, therefore, be discharged, and the motion for the injunction refused with costs.[4]

*April 15.*—Several commissions having been sent abroad for the examination of witnesses, whose depositions were to be used at the trial of the action, the plaintiffs moved, before the Vice-Chancellor, that this cause, which had been previously set down for hearing, might be advanced, and appointed to be heard on an early day. His honor refused the motion, with costs. The plaintiff now moved, by way of appeal, before the Lord Chancellor, that the order of the Vice-Chancellor might be discharged or varied ; and that the cause might be advanced, and appointed to be heard before the Lord Chancellor, or the Vice-Chancellor, on an early day.

Mr. *Knight Bruce* and Mr. *Blunt*, in support of the motion said, that in order to give time for the return of the commissions from abroad, the trial would necessarily have to be postponed until the month of February, 1842, and, that if the cause were now brought speedily to a hearing, it was hoped that the account might be taken in the master's office, and the cause heard

[4] "The mere existence of cross demands, does not of necessity give a right of equitable set-off ; and certainly the mere pendency of an account, out of which a cross demand may arise, will not confer such a right. I had occasion, when at the bar, to give great attention to the question of equitable set-off, in the case of *Rawson v. Samuel* ; and the judgment of Lord Cottenham in that case, on appeal, will be found fully to justify the opinion which I now express. It was there decided, that in the case of cross demands arising out of transactions not necessarily connected with each other, a court of equity is bound to look into all the circumstances of the case, and see whether an equity is made out for blending the two matters together, at the expense of possible delay in concluding one of those matters." *Wigram, V. C. Dodd v. Lydall*, 1 Hare, 337. In a subsequent case, the Vice-Chancellor urges the same principle. He says : "Can a debtor withhold payment of a debt, which by law and in honor he ought to have paid long since, merely by saying his creditors' securities for another unconnected debt, will be found, upon accounts being taken, to exceed the amount of that other debt ? I know of no such equity." *Gordon v. Pym*, 3 Hare, 223. So, in *Dade v. Irwin's Ex'r*, 3 How. 383, 390, Story, J. delivering the opinion of the Supreme Court of the United States, said : "Now it is clear, that courts of equity do not act upon the subject of set-off in respect to distinct and unconnected debts, unless some other peculiar equity has intervened, calling for relief ; as for example, in cases where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises, that the one is understood by the parties to go in liquidation or set-off of the other." See further, *Clark v. Cort*, ante, 154 ; *Irving v. De Kay*, 10 Paige, 319 ; *Gay v. Gay*, id. 369 ; *Hurlbert v. The Pacific Ins. Co.*, 2 Sumn. 471 ; *Gordon v. Lewis*, id. 628, 633 ; *Jones v. Messop*, 3 Hare, 568 ; 2 Story's Eq. § 1436.

1841.—*Rawson v. Samuel.*

on further directions before the action could be disposed of : by which means if the balance should turn out to be in favor of the plaintiffs, and the defendant should recover a verdict against them, they would be in a situation [\*182] to set off one judgment debt against another. \*They also observed, that as the decree would be a simple decree for an account, which would be almost of course, the hearing would occupy but a very short time, and they insisted that they were the more entitled to the indulgence of the court, from the circumstance of their having to contend with a party who was availing himself of the courts of this country while he continued to reside out of the jurisdiction.

Mr. *Wigram, contra.*

THE LORD CHANCELLOR (after observing that he should be very unwilling to interfere with the Vice-Chancellor's control over his own paper,) said that it could not be assumed, upon an application of this kind, that a cause would occupy but a short time in hearing ; and that, although any objections which the defendant might personally make to the application, were entitled to very little attention, yet that it was due to the other suitors of the court whose causes were also waiting to be heard, that no suit should be allowed a precedence, unless upon some special reason being shown why justice could not otherwise be effectually administered in it, and that a strong case would therefore be required, to justify a departure from the ordinary course. Now, in the present instance, it did not appear likely that any advantage would be gained by advancing the cause, even supposing that the plaintiffs were, upon the merits, entitled to ask for such a privilege ; for considering that the accounts related to transactions in distant parts of the world, it was extremely improbable that the master's report could be obtained before the month of February in the next year, when it was said the trial was to take place. But, independently of that circumstance, this did not appear to be a case in which justice at all required that the cause should be taken out of [\*183] its turn. For if the \*plaintiffs were right, they would have a verdict in their favor ; and then they would have no interest in advancing the cause : on the other hand, if they were wrong, they were asking the court to depart from its ordinary course in order to protect them from the consequences of their breach of duty. They were therefore coming to ask this indulgence in a case in which they could not require it, unless they should turn out to have done that for which they were liable to damages in an action at law. The motion must be refused with costs.

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1841.—Caldecott v. Caldecott.

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## CALDECOTT v. CALDECOTT.

1841 : February 5.

In order to enable the court to adjudicate upon the right to a residue of personal estate as between the next of kin, as a class, and a party claiming under a will, it is not necessary that all the next of kin should be present, provided the court be satisfied that some of them are parties to the record.

THE testator, by his will, gave the residue of his personal estate to his executors, upon certain trusts, which were so expressed as to raise a question whether the plaintiff, who was a nephew of the testator, was entitled to have the residue laid out in land, to be settled to the same uses as an estate of which he was tenant for life under the will, or whether the trusts which were so declared were void for uncertainty.

The suit was instituted for the purpose of taking the judgment of the court upon that question ; the executors admitting that there was a clear residue in their hands amounting to about 30,000*l*.

The defendants to the bill were the testator's widow and his heir at law, who were, together with the plaintiff, also the executors of the will, the first tenant in tail, in remainder, of the estate of which the plaintiff was \*tenant for life, and several persons whom the bill represented, and [\*184] all the answers admitted, to be the nephews and nieces of the testator, and to be, together with the plaintiff and the defendant, the heir at law, his only next of kin. No evidence was taken in the cause.

On the opening of the case at the hearing, Mr. *Wigram*, who appeared for the widow and executrix, suggested that there had been no inquiry as to the next of kin, and submitted whether the question of title to the residue could be properly discussed until it had been regularly ascertained whether the next of kin were before the court.

THE LORD CHANCELLOR overruled the objection ; saying that, as the question was between the next of kin, as a class, and another party, it was enough that some of the next of kin were present. If the object had been to distribute the fund, it would have been necessary that all should be present.

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The cause then proceeded, and the Lord Chancellor made a decree in favor of the plaintiff's claim.

Mr. *Jacob*, Mr. *Wigram*, Mr. *Richards*, Mr. *Bethell*, Mr. *Girdlestone*, Mr. *Hodgson*, Mr. *James Parker*, Mr. *Lloyd*, Mr. *Bird*, and Mr. *Martindale*, appeared for the different parties.[1]

[1] The accuracy of the above report of the case of *Caldecott v. Caldecott*, has been questioned. In *Hawkins v. Hawkins*, 1 Hare, 543, 545, *Wigram*, V. C. said : " The practice of Lord Cottenham was directly the reverse of that which he is represented as having sanctioned in that case ; and indeed a contrary rule is expressed by the same learned judge, in *Shuttleworth v. Howarth*, [post 230.] I have caused reference to be made to the minute book of the Registrar with regard

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 1841.—Jew v. Wood.
 

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[\*185]

\*Jew v. Wood and others.

1841: March 27, 31.

Where one of the defendants to a bill of interpleader insists that the effect of some act of the plaintiff is to deprive him, against that defendant, of the right which he would otherwise have to treat the case as one of interpleader, the court will not, on that account, refuse an injunction, unless it be satisfied either that the act relied on has the effect which the defendant attributes to it, or at least that the question, whether it has that effect or not, is a real and substantial question to be tried.

And therefore, where a tenant filed a bill of interpleader against two sets of persons who claimed to be respectively devisees and co-heirs of his original landlord, an injunction was granted to stay proceedings at law by one of the parties for the recovery of rent, on payment, of the rent due, into court, although it appeared that the plaintiff had, by a memorandum in writing, acknowledged the title of that party, and paid rent to him for nearly two years after the original landlord's death, such acknowledgment and payment appearing to have been made in ignorance of his title being disputed.

THE plaintiff in this cause was the tenant of a house and printing office at Gloucester, formerly the property of James Wood deceased, under whom the plaintiff had held the house, at a yearly rent, for several years previous to his death. James Wood died in the month of April, 1836, leaving real and personal estates to a very large amount. Shortly after his death, two testamentary papers were set up as containing his last will; by the first of which he appointed his friends, Sir Matthew Wood, Bart., John Chadborn, Jacob Osborn, and John S. Surman, to be his executors; and by the second, which bore date two days after the first, and was attested by three witnesses, he declared his wish that his executors should have all his property which he might not dispose of, and that all his estates, real and personal, should go amongst them and their heirs, in equal proportions, subject to his debts and to any legacies which he might thereafter bequeath.

to *Caldecott v. Caldecott*; and the note made by the Registrar does not correspond with the report. [See *infra*.] It appears to have been stated, at the hearing, that all the parties who claimed to be interested were in truth before the court; and the attention of Lord Cottenham might not have been attracted to the circumstance, that the presence of the next of kin was not shown by evidence. From my own recollection of the case, I know it was represented as of great importance to the parties, that the opinion of the court should be speedily obtained,—the departure of the plaintiff for India depending upon the decision. The cause was certainly heard, and the bill dismissed as against the next of kin; but I am satisfied that the report does not accurately represent the judgment of the court upon this point: it is possible that the admissions in that case might have been treated at the bar as evidence that the next of kin were parties; but Lord Cottenham could not have said, that their rights might be adjudicated upon in their absence." "By the minute book," above referred to, "it appeared that *Caldecott v. Caldecott* came on for hearing before the Lord Chancellor, Dec. 18th, 1840: the following is an extract from the Registrar's note of the cause on that day. 'Lord Chancellor:—The plaintiffs may amend their bill and bring all the proper parties before the court,' &c. The cause came on again Feby. 5th, 1841, when the Registrar notices, that Mr. J. Parker, with Mr. Richards, for the plaintiffs stated—'All parties who claim as next of kin are now before the court.' The cause was heard and the decree made, Feb. 6th, 1841." Ibid. n. c. See *Gaskell v. Holmes*, 3 Hare, 448; *Say v. Creed*, id. 457; *Shuttleworth v. Howarth*, 4 Myl. & Cr. 495; S. C. Post, 228, 230; *Harvey v. Harvey*, 4 Beav. 250; *Lowry v. Fulton*, 9 Sim. 114; *Richardson v. Larpent*, 2 Yo. & Coll. C. C. 507.

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A suit having been instituted in the Ecclesiastical Court, in which the validity of those papers, as regarded the personal estate, was called in question, that court pronounced its judgment on the 20th of February, 1839; by which it refused probate of the first paper. \*From that judgment, [\*186] however, the persons named as executors appealed to the Privy Council. In the meantime, the plaintiff had made several payments of rent to them, as devisees of James Wood, the last of such payments being made on the 3d of February, 1838, in satisfaction of the rent due on the 29th of September, preceding.

On the 30th of March, 1839, the plaintiff received a written notice purporting to be given on behalf of certain persons who claimed to be co-heirs of James Wood, and requiring him to pay his rent in future to them. That notice was followed, a few days afterwards, by a counter notice from the four persons above named, requiring him to pay his rent as before to them. Under those circumstances, the plaintiff paid no more rent to any one; and on the 15th of June, Sir Matthew Wood and Jacob Osborn caused distresses to be levied on the premises for their respective one-fourth shares of the rent then in arrear. On the 9th of December, 1840, the plaintiff declared in actions of replevin against those two parties and their respective bailiffs; and the defendants in those actions having respectively avowed and made cognizance, the plaintiff pleaded *non tenet*, upon which pleas issue was joined. On the 3d of February, 1841, the defendants in those actions gave the plaintiff notice of trial for the ensuing Gloucester assizes, and, on the 9th of March, following, the bill in this cause was filed against Sir Matthew Wood, Jacob Osborn, John Surman, and the devisees of John Chadborn, who was then dead, and also against the several persons who had claimed to be the co-heirs of James Wood, with the husbands of three of them who were married women, alleging that, shortly after the death of James Wood, Sir Matthew Wood, Osborn, Surman, and Chadborn, called a meeting of his tenants \*which was attended by the plaintiff amongst others, and at which [\*187] they represented that James Wood had made a will by which he had devised all his real estates to them, and appointed them his executors; that, upon the faith of that representation, the plaintiff paid to them the rent then due for the house and printing office, and also signed a memorandum, the exact purport of which he was unable to set forth, inasmuch as it had ever since remained in their possession, but which was alleged to be an acknowledgment of their title to the premises, as devisees of James Wood, and that his subsequent payment of rent to those persons had been made upon the faith of the same representation, no other person having made any claim upon him, in respect of the rent, previously to the notice of the 30th of March, 1839. The bill then alleged, that the co-heirs also threatened to take proceedings against the plaintiff for the rent in arrear; and it prayed that the defendants might be decreed to interplead together, and that it might be ascertained, in such manner as the court should direct, to whom the rent of the



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house and printing office belonged and ought to be paid, and that the plaintiff might be at liberty to pay into court the sum of 84*l.*, being the rent which had accrued since the 29th of September, 1837, and the rent which should thereafter become due, which he thereby offered to do, for the benefit of such of the defendants as should appear to be entitled to it, and that, upon such payment, the defendants Sir M. Wood and Jacob Osborn might be restrained, by injunction, from further proceedings in the actions of *replevin*; and that all the other defendants might, in like manner, be restrained from levying any distress, and from commencing or prosecuting any action or other proceedings at law against the plaintiff, in order to compel payment of the rent which had accrued due for the premises since the 29th of September, 1837, or of 'the rent which should thereafter accrue due in respect thereof.

The bill was accompanied by the usual affidavit, denying collusion between the plaintiff and the defendants, or any of them.

Sir Matthew Wood, by his answer, set forth the memorandum referred to by the bill, and which was in fact an entry in a book belonging to Jacob Osborn, which entry was signed by the plaintiff, and purported to be a settlement of account between him and Sir M. Wood, Osborn, Surman, and Chadborn, on the 23d of May, 1836, for the rent due from the plaintiff on Lady-day preceding. Sir Matthew Wood then stated his belief that the plaintiff did give credit to the representations made at the meeting, and that no claim or demand of rent had, previously to that occasion, been made upon him by any other person. He then stated that he did not know whether the notice of the 30th of March was the first intimation the plaintiff received, that any person other than himself and his co-devisees laid claim to the premises; but he said he believed that the plaintiff was aware of the pendency of the suit in the Ecclesiastical Court before he made his last payment of rent, that suit having been commenced in the month of June, 1836.

Before the answer was put in, the plaintiff had obtained an *ex parte* injunction, in the terms of the prayer of the bill, upon payment into court of the amount of rent claimed.

The defendant, Sir M. Wood, after putting in his answer, moved, before the Master of the Rolls, to dissolve the injunction, but his lordship [\*189] refused the motion, and it was now renewed, by way of appeal, before the Lord Chancellor.[1]

Mr. *Turner* and Mr. *Walker*, in support of the motion.—A plaintiff, in a bill of interpleader, is bound to show that there is no question between himself and either of the defendants, collateral to that upon which he calls upon them to interplead; *Crawshay v. Thornton*.(a) The general principle will not now be disputed; but it will be said that the plaintiff, having originally taken possession under James Wood, continued, after his death, to be tenant

(a) 2 Mylne & Craig, 1.

[1] The case before the Master of the Rolls is reported 3 Beav. 579.



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to his heirs, and that he has never been tenant to the parties claiming under his will. He has, however, paid rent for two years to those parties, and it is not suggested that he has done so in consequence of any wilful misrepresentation or concealment on their part: on the contrary, he appears to have persisted in paying his rent to them, after he must have known that their title was disputed. That circumstance alone distinguishes this case from those cases at law which will be cited on the other side: but even if those cases were not so distinguishable, their authority is considerably shaken by the case of *Hall v. Butler*,<sup>(a)</sup> which is the latest decision on this subject, and which, if it has not restored the old rule, that a tenant cannot, under any circumstances, be allowed to dispute the title of the person whom he has once recognized as his landlord, is sufficient, at least, to show that the point is one which admits of very nice distinctions, and on which the law is far from being accurately defined. At all events, it is not so clear that what has taken place between the plaintiff and the parties claiming under the will, has not created a new tenancy, as to justify this court in depriving the defendant, who makes this motion, of the "opportunity of discussing [\*190] that question before the tribunal to which it properly belongs: *Powis v. Smith*.<sup>(b)</sup>

Mr. Wigram and Mr. Chapman Barber, *contra*.—The argument on the other side proceeds upon a misapprehension of the doctrine laid down in *Crawshay v. Thornton*. It was never meant to be decided in that case, that because a stakeholder has acknowledged the title of a person by letter or otherwise, he is estopped from requiring that person to interplead with a third party. The facts of that case were simply these—that the firm of which the plaintiff was a member having received a deposit of some iron from Raikes, had, by his directions, written a letter to Thornton, informing him that they held the iron at his disposal: after which a paramount claim to the iron was set up by Daniloﬀ. Now the ground of the decision was, not merely that a letter had been written by Crawshay to Thornton acknowledging his title, but that that letter had given to Thornton the same rights as against Crawshay which Raikes had before, and consequently, that inasmuch as Crawshay could not have made Raikes, from whom he originally received the iron, interplead with Daniloﬀ, so neither could he make Thornton. It cannot, however, be doubted, that Crawshay might, notwithstanding the letter, have required Thornton to interplead with Raikes. And if so, neither the case of *Crawshay v. Thornton*, nor that of *Hall v. Butler*, which turned upon the same principle, can furnish any authority against the order now appealed from. It is true that the dealings between the stakeholder and one of the claimants may be of such a nature as to create rights and liabilities between them, which no litigation between those claimants alone could determine, and cases might, perhaps, be "put, in which a court of [\*191] equity would hesitate to decide upon the effect of such dealings, upon

(a) 10 Adol. & Ellis, 204.

(b) 6 B. & Ald. 850.

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a motion for an injunction, or upon a demurrer to a bill of interpleader; but it does not therefore follow, that the mere fact of the stakeholder having dealt with, or written to, a party gives that party a right to say that he will have the opinion of a court of law as to the legal effect of what had been done or written. Your lordship has lately decided the contrary in the case of *Stuart v. Welch*,<sup>(a)</sup> which shows that there is no such invariable rule on the subject, and that this court will not withhold its interposition in such a case, provided it can see clearly, from the facts before it, what the opinion of a court of law would be.

In the present case, the legal effect of what is alleged to have taken place between the plaintiff and the defendants claiming under the will, can admit of no question; because it has been established, by a long series of decisions at law, that although a tenant cannot be allowed to dispute the title of the party from whom he has received possession, yet that mere attornment by a tenant, already in possession of land, to another, on the supposition of his being the owner, is not sufficient to create a tenancy between them, or consequently to preclude the party so attorning from afterwards putting the other to the proof of his title, if an adverse claimant should appear; *Rogers v. Pitcher*,<sup>(b)</sup> *Fenner v. Duplock*,<sup>(c)</sup> *Gregory v. Doidge*,<sup>(d)</sup> *Hopcraft v. Keys*,<sup>(e)</sup> *Doe dem. Plevin v. Brown*.<sup>(g)</sup>

The consequence is, that the only issue to be tried in this action is an issue of *devisavit vel non*, with which the plaintiff has no concern, [\*192] and which, he has therefore a \*right to insist, shall be tried between the parties really interested in the question.

Mr. Turner in reply.

*March 31.*—THE LORD CHANCELLOR:—'This is a bill of interpleader, filed by a person who is a tenant of part of the lands belonging to the late Mr. James Wood, against certain persons who claim under the alleged will of Mr. Wood, and others who claim as heirs at law. The question in contest between the co-defendants being, whether there was a good testamentary disposition of the property of the late Mr. James Wood, it would be quite a regular case for a bill of interpleader, if it were not for certain special circumstances which are stated to have taken place between the tenants of the property and those who claim to be devisees.

Sir Matthew Wood, the party who disputes this being a proper case for interpleader, states, that after the death of James Wood, there being papers found which were supposed by the defendant to pass the real estate, (and which is a subject still under litigation,) a meeting was called of the tenants, which was attended, amongst others, by the present plaintiff. He states that, upon that occasion, the defendant and other persons, who claim as devisees, represented that they were entitled to these lands, lately the es-

(a) 4 Mylne & Craig, 305.

(d) 3 Bing. 474.

(b) 6 Taunt. 202.

(e) 9 Bing. 613.

(c) 2 Bing. 10.

(g) 7 Adol. & Ellis, 417.

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tate of James Wood, under the will made by him as before mentioned ; and the defendant says that he believes, that the plaintiff did believe such representation to be true. Then the answer states the circumstances under which those tenants signed a paper containing an account of rent, and subsequently paid rent to those who claim as devisees, for a certain length of time after this meeting took place.

\*These are the circumstances, taken from the answer of the defendant, upon which the question is raised, whether this be or be not a proper case of interpleader. The Master of the Rolls considered it to be so, and restrained certain proceedings which were pending between the parties for the recovery of rent due from the tenant. The Master of the Rolls granted an injunction, as is usual in cases of interpleader, upon the plaintiff paying the rent due into court. It was objected to the order of the Master of the Rolls, that this was not a proper case of interpleader, within the principle laid down in *Crawshay v. Thornton*, because the plaintiff was under liabilities to one of the defendants, Sir M. Wood, beyond those which arose from the title to the property in question, and which no litigation between the co-defendants would therefore determine. That was the principle laid down in *Crawshay v. Thornton*, derived from the cases which I found to have established, as I thought, that rule ; and no question is raised in this case as to that doctrine. The question is, whether this case falls within it or not. [\*193]

Now such liability, namely, a liability between the plaintiff and Sir Matthew Wood, independently of the question arising upon the title in contest between the co-defendants, is said to arise from the plaintiff's being precluded from disputing the title of Sir M. Wood as his landlord, upon the ground of having paid rent, and done other acts stated to amount to an attornment and acknowledgment of Sir M. Wood as his landlord. The question, therefore, is, whether the facts stated in the pleadings, or rather the answer of Sir M. Wood, show that there is a substantial question to be tried, upon that ground, between Sir M. Wood and the plaintiff ; for the mere fact of such a claim being made and such a question being raised, cannot avail, unless it appears to the court that there is a real and substantial question \*to be tried. In a question of injunction, if it turns upon a matter of law or equity, the court exercises its discretion to see whether there is really a substantial question to be tried ; and if, instead of being a matter of law or equity, it be a matter of fact, it must also exercise a similar discretion. [\*194]

Now, several cases were cited to show that what has taken place between the plaintiff and Sir M. Wood precluded the plaintiff, the tenant, from disputing the title of Sir M. Wood, whatever might be the result of the litigation between Sir M. Wood, claiming as devisee, and the heirs at law, who dispute the will set up on part of the devisees ; and I postponed the considera-

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tion of this case till to-day that I might have an opportunity of examining those cases.[2]

It appears to me established, by the uniform current of all the cases, (for there is not that discrepancy between the cases which was suggested,) that the rule of law is, that after the death of the person to whom the occupier became tenant, the tenant may require the person claiming under the original lessor to prove his title under such original lessor; and that although the tenant has paid rent to the person so claiming under the original lessor, he is not precluded from so doing by the payment of rent, and other acts which might under other circumstances, amount to an attornment.

Several cases were cited. *Rogers v. Pitcher*,<sup>(a)</sup> was one; that was a case of mere mistake as to the title of the party to whom the rent was paid. There was no misrepresentation by the party so obtaining payment of the rent: it was a mere misapprehension, and the payment of rent under such misapprehension was not \*considered as altering the situation of the tenant. He was permitted to call upon the person claiming his land to prove his title.

*Fenner v. Duplock*<sup>(b)</sup> proceeded entirely upon the tenant's ignorance of the title of the party who claimed the rent.

*Gregory v. Doidge*<sup>(c)</sup> is a still stronger case: there does not appear to have been any misrepresentation; the tenant had deliberately acknowledged the party claiming as his landlord, and made an agreement with respect to the rent upon that footing; but this proving to have been done in ignorance of the title of the other party claiming, was held not to bind the tenant.

The case of *Hopcraft v. Keys*<sup>(d)</sup> has no direct application; that decision having proceeded upon this—that the occupier did not hold under the party who claimed the rent, that party having been evicted by a title paramount, and the occupier having commenced a new tenancy under the party who so evicted his prior landlord.

The case of *Doe dem. Plevin v. Brown*<sup>(e)</sup> was a case of attornment made by the direction of the person under whom the tenant held. The title was disputed by his assignee; but Lord Denman, in holding that the tenant was at liberty to dispute the title of the person to whom he had attorned, says that it was competent for him "to explain and render inconclusive acts done under mistake or through misrepresentation," putting, therefore, mistake and misrepresentation, for that purpose, upon the same footing.

[\*196] \*So far I think it was admitted at the bar that the cases were uni-

(a) 6 Taunt. 202.

(d) 9 Bing. 613.

(b) 2 Bing. 10.

(e) 7 Adol. & Ellis, 447.

(c) 3 Bing. 474.

[2] As to the general rule that a tenant cannot dispute the title of his landlord: see *Attorney General v. Lord Hotham*, Turn. & Russ. 209; S. C. 3 Russ. 415; *Stanley v. Robinson*, 1 Rom. & M. 528, and n. 1, *ibid*; *Buchannon v. Upshaw*, 1 How. 87; *Crawford v. Fisher*, 1 Hare. 440; *Magill v. Hinesdale*, 6 Conn. Rep. 469; 3 Story's Eq. § 812; Pal. Pr. & Ag. (ed. by Doul.) 10, n. k.

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form. But a case was referred to, *Hall v. Butler*(a) which, it is contended, establishes a different doctrine. Now I think the doctrine of that case is by no means inconsistent with the former cases, but completely and entirely consistent with them. In that case, the tenant took possession, and held under a person named Nevitt, who afterwards directed the tenant to pay his rent in future to the defendant, Butler. Another person then claimed by title paramount to Nevitt. Butler, the defendant, was entitled to stand in Nevitt's place; and the tenant, who could not dispute Nevitt's title, was held to be equally precluded from disputing Butler's. The judges put it upon this ground, either that the defendant Butler ratified the demise, or that there was a fresh demise by him; and that in either case the tenant could not dispute Butler's title. Now it will be observed that in either case the tenant was disputing the title of the person from whom he derived his tenancy, and not the title of a party claiming through such person. There is nothing, therefore, at all inconsistent in the doctrine of that case with the doctrine of all the preceding cases.

Upon this review of the cases at law, there appears to me to be no doubt but that the plaintiff, notwithstanding what has passed between him and the defendant, Sir M. Wood, is entitled to show if he can, that Sir M. Wood is not a devisee of the original lessor, and therefore not entitled to the tenant's rent; the consequence is that there is no question between the plaintiff and any of the defendants, except that which is in dispute between the different defendants, and that this is, therefore, a proper case for interpleader.

The motion must be refused, with costs.[3]

(s) 10 Adol. & Ellis, 204.

[3] To the report of this case in 3 Beav. see p. 586, *ibid.*, the following note is appended: "The cause was heard by Sir J. L. Knight Bruce, on the 17th of March, 1842, when the injunction was continued: the plaintiff was ordered to pay his rent into court, and was awarded his costs of suit out of the fund in court. The other costs were reserved." In *Badeau v. Tylee*, 1 Sand. Ch. Rep. 270, 273, Assistant Vice-Chancellor Sandford, deciding the case before him, in conformity with the doctrine of the case in the text, refers to, and states the case of *Doran v. Everitt and others*, 2 Irish Eq. Rep. 28, before the Master of the Rolls, which he observes, "is directly in point, and goes far beyond the cases under consideration. The complainant demised from A. M'Dermott for twenty-one years if E. P. so long lived. The lessor was seised in fee, and at his death, left a will made in due form, devising the estate in fee to the defendant, C. Everitt, as his wife, and made her the executrix. She proved the will, and obtained probate in the Ecclesiastical Court. She claimed the rents of the complainant, and he paid them to her from 1832 to 1837. In November, 1837, he was served with a written notice by the defendant, T. M'Dermott, claiming to be the heir at law of the lessor, stating that the will was obtained by fraud, and that a suit had been instituted to avoid it; and cautioning the complainant against paying any rent to C. Everitt, &c. Such a suit was in fact prosecuted by him against Everitt. T. M'Dermott claimed to be entitled to the rent from the service of this notice, and several notices were served on the complainant by each party, claiming the rent, demanding instant payment, and threatening to distrain. The tenant withheld his rent for two years, and then interpleaded the wife and heir. It was objected to the bill that it showed a clear legal title in the defendant Everitt, under the will of the lessor, to receive the rents; and that the precarious claim of A. M'Dermott grounded upon a loose and unsupported allegation of fraud, did not justify the tenant

# REPORTS OF CASES

ARGUED AND DETERMINED IN

## THE HIGH COURT OF CHANCERY.

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*Between* CHARLES LANCELOT HOGGART, Plaintiff; *and* JOHN CUTTS,  
CHARLES VICKERS, AND WINWOOD THODEY, Defendants.

1841: April 19.

Where a fund in the hands of a stakeholder was contested by three parties, one of whom claimed the whole of it, and the other two claimed it in certain proportions, and the stakeholder filed a bill of interpleader against the three claimants, the court, at the hearing, dismissed the bill with costs, as against one of the parties claiming a part of the fund, and decreed that the other two parties should interplead as to the other part.

Form of decree in an interpleading suit.

THE plaintiff in this cause, who was an auctioneer, was employed, in the month of June, 1835, by the defendant Thodey, to sell an estate for him by auction. The plaintiff, accordingly, advertised the estate to be sold, subject to certain conditions of sale, by which it was, amongst other things, provided that the purchaser should, at the time of the sale, pay a certain proportion of the purchase money by way of deposit, and that, in the event of his not complying with the conditions, the deposit should be forfeited. The [\*198] sale took place \*on the 19th of June, 1835, when the defendant Cutts became the purchaser for the sum of 670*l.* and paid the sum of 134*l.* to the plaintiff as a deposit. In consequence of some disputes which arose between Thodey and Cutts about the title, the completion of that purchase was delayed; and in the month of May, 1837, Thodey, alleging that his contract with Cutts was at an end, and that the deposit of the latter had been forfeited, instructed the plaintiff to put the estate up again to auction. A second sale accordingly took place, at which the defendant Vickers became the purchaser for the sum of 640*l.*, and paid the sum of 128*l.* to the plaintiff as a deposit. Cutts, however, continued to insist upon a specific performance

in refusing to pay his rent to the legal owner, or in filing an interpleader bill. The court, nevertheless, held it to be a sufficient case for coming into equity for relief." As to when a bill of interpleader will lie, and the practice and proceedings thereon, see the next case; *Swart v. Welch*, 4 Myl. & Cr. 305; 2 Myl. & Cr. 24, n. 1; 2 Sim. & Stu. 64, n. 1. Whether an agent may file a bill of interpleader against his principal; see Pal. Pr. & Ag. (ed. by Danl.) 10, n. k.



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of his contract; and disputes having, in consequence, arisen between the three defendants, as to their respective rights under the two contracts, Thodey brought an action against the plaintiff for the recovery of both the deposits. Upon that action being brought, the plaintiff applied to Cutts and Vickers for instructions, and suggested to them that, if they objected to his paying over the deposits to Thodey, they should either indemnify him in defending the action on their behalf, or that they should undertake the defence of it themselves as to their respective proportions. To that suggestion, however, they refused to accede, and at the same time warned the plaintiff that, if he paid over their deposits to Thodey, he would do it at his own risk, and that they should, at all events, hold him responsible for them.

A bill was afterwards filed by Cutts against Thodey, the plaintiff and Vickers, praying a specific performance of his contract, and an injunction to restrain Thodey from proceeding in his action. No injunction, however, was ever moved for in that suit; and Thodey continuing to prosecute his action, the plaintiff, after two unsuccessful applications to a judge [\*199] for the purpose of compelling the defendants to interplead at law, filed the bill in this cause on the 5th of June, 1838, praying that the defendants might interplead, that the plaintiff might be at liberty to bring the deposits into court, and that Thodey might be restrained by injunction from the further prosecution of his action, and that the other defendants might in like manner, be restrained from all other proceedings at law touching the matters in question.

On the 8th of June, 1838, the plaintiff moved, before the Master of the Rolls, that he might be at liberty to pay the deposits into court, and that thereupon an injunction might issue in the terms of the prayer of the bill; which was ordered accordingly. Under that order, which recited that all the defendants had appeared upon the motion, the two deposits were paid into court in one gross sum, and were invested, in the usual manner, in the purchase of a sum of 277*l.* 12*s.* 4*d.* bank 3 per cent. annuities.

The defendants then put in their several answers to the bill.

Cutts, by his answer, insisted that he was entitled to a specific performance of his contract, and that, in the mean time, his deposit ought not to be paid to Thodey. He also stated, that, a few days before the second sale, he had warned the plaintiff not to offer the estate again for sale, at the same time requiring him to hold his (the defendant's) deposit, until the title should be completed.

Vickers, by his answer, claimed to be interested in the deposit paid by him; inasmuch as, if Thodey should be "unable to give him [\*200] a good title to the estate, he would be entitled to have his deposit returned to him, with interest.

Thodey, by his answer, submitted that he ought to be allowed to proceed in his action for a recovery of the deposits, and that if Cutts or Vickers dispu-

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ded his right, they ought to be allowed to defend the action in lieu of the plaintiff.

None of the answers, however, raised any objection to the frame of the suit, or, in terms, disputed the plaintiff's right to the relief prayed by the bill.

No evidence was taken in the cause; and by the decree, made by the Master of the Rolls, it was referred to the master to tax the plaintiff his costs of the suit, and of the action at law in the pleadings mentioned; and it was ordered that so much of the sum of 277*l.* 12*s.* 4*d.* bank 3 per cent. annuities, as, together with the sum of 16*l.* 13*s.* cash, standing in the name of the Accountant General in trust in the cause, would be sufficient to raise those costs when taxed, should be sold, and that out of the money to arise by such sale, together with the sum of 16*l.* 13*s.* cash such costs should be paid to the plaintiff's solicitor; and it was ordered that the injunction awarded by the order of the 8th of June, 1838, to restrain all the defendants from proceeding against the plaintiff at law as therein mentioned, should be continued until the further order of the court; and all parties were to be at liberty to apply, as there should be occasion.

The defendants Cutts and Vickers having respectively appealed from that decree, the two appeals now came on to be heard together.

[\*201] \*Mr. *Richards* and Mr. *Rogers*, for the plaintiff, in support of the decree.—The objection which will be taken to the frame of the bill, as being multifarious, is not entitled to any attention at this stage of the suit: for it is one which is, in all cases, within the discretion of the court, *Campbell v. Mackay*,<sup>(a)</sup> and is seldom, if ever, allowed to prevail at the hearing. In interpleading suits, after the fund in dispute has been paid into court, it is too late even to demur: *Hyde v. Warren*.<sup>(b)</sup>

[THE LORD CHANCELLOR:—It is impossible that the payment of money into court can have that effect.]

In the present case it is not necessary to contend for so general a proposition, because the motion for liberty to pay the money into court was not made *ex parte*, but in the presence of all the defendants, and if they had any objection to make to the frame of the bill, that was the proper time to have made it: at all events, the objection, if a valid one, should have been taken by their answers, if they intended to rely upon it at the hearing.

[THE LORD CHANCELLOR:—The difficulty is not one of form merely, but that the two purchasers are not claiming the same thing. It is competent to the defendants, if the facts are before the court, to insist upon any objection of that kind at the hearing, though not raised by their answers.]

If, however, the court sees that the plaintiff is a mere stakeholder, it is bound, if it can, to find the means of determining the rights of the  
[\*202] different claimants \*without involving him in the litigation between them; and it has the power to prescribe to the defendants any course

(a) 1 Mylne &amp; Craig, 603.

(b) 19 Ves. 322.

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of proceeding which it may think fit for that purpose; *Angell v. Hadden*.<sup>(a)</sup> In the present case, the Master of the Rolls was of opinion, that the prosecution of Cutts's suit for specific performance was the readiest mode of determining the rights of all parties; and finding that suit already instituted, his lordship considered it unnecessary to give any directions in his decree, as to the particular mode in which the parties were to interplead.

[THE LORD CHANCELLOR:—If Cutts succeeds in that suit, it will decide the rights of all the parties: but if he fails, it leaves Vickers's claim wholly undecided.]

If that proceeding be considered ineffectual, the court may mould Thodey's action in such a manner as to enable Cutts and Vickers to defend it as to their respective deposits; and in that way the rights of all parties may be determined.

Mr. *Lee* and Mr. *Heathfield*, for the defendant Cutts.—There is no precedent for such a bill as this. The case which it states is not, as between two of the parties at least, a case for interpleader; that proceeding being applicable only where two or more persons claim the same debt or duty, *Crawshay v. Thornton*,<sup>(b)</sup> whereas Cutts and Vickers are here claiming two totally different things. The plaintiff has himself complicated the case by reselling the estate after he had notice of Cutts's title. How \*can he [\*203] ask the assistance of the court to relieve him from the embarrassment which he has created by his own act? The resale to Vickers was an implied slander on Cutts's title; and the plaintiff, by concurring in that act, has contracted a personal liability to Cutts, which no litigation between the co-defendants can determine.

[THE LORD CHANCELLOR:—The sale to Vickers could not affect Cutts's title to his deposit. Do you mean that if the plaintiff had filed a bill against Thodey and Cutts only, that would not have been a good bill of interpleader?]

The conduct of the plaintiff is, at all events, material to that part of the decree which gives him his costs. According to a decree in an old case, cited in *Dowson v. Hardcastle*,<sup>(c)</sup> the plaintiff in an interpleading suit is entitled to his costs only where it appears "that he has not done any thing amiss in the cause,"—which cannot be predicated of the plaintiff in this case. With respect to the two modes of proceeding which have been suggested for the purpose of determining the rights of all the defendants in this suit, your lordship has already disposed of the first, and the failure of the attempt to make the defendants interplead at law is a sufficient proof of the impracticability of the second.

Mr. *Tinney* and Mr. *Rasch* appeared for the defendant Vickers, but were stopped by

THE LORD CHANCELLOR; who said—That he did not see how it was pos-

(a) 16 Ves. 202.

(b) 2 Mylne & Craig, 1; see p. 21.

(c) 2 Cox, 278; see p. 279.

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sible to maintain the decree against Vickers; because he might have [\*204] \*grounds for recovering his deposit, quite independent of Cutts's title: besides, the decree was clearly wrong, as to him, in other respects. Hoggart had put up the property a second time for sale, having Cutts's deposit already in his hands, and it could not be assumed, as a matter of course, that Hoggart was entitled to his costs, under those circumstances, as against Vickers.

Mr. *Wood* appeared for Thodey.

Mr. *Richards* in reply.

THE LORD CHANCELLOR:—This is a case in which it is very probable that, by consent and arrangement between the parties, all the questions might be disposed of, in such a manner as to save expense; but if it comes adversely before me, the sole question for me to consider is, whether this is a proper case for interpleader. It has been objected, that the suit is multifarious; and so it is, in a certain sense: but that is not the only objection. The cases in which the objection of multifariousness has been overruled at the hearing, are cases where the questions blended together are such as it is inconvenient, as a general rule, to unite in one suit, but which the court can nevertheless deal with when so united. Here, the questions blended together are such as the court cannot so deal with.[1]

The real objection, however, here, is, that this is not a case for interpleader at all. The definition of interpleader is not, and cannot, now, be disputed. It is where the plaintiff says, I have a fund in my possession in which I claim no personal interest, and to which you, the defendants, set up con-

flicting claims; pay me my costs, and I will bring the fund into [\*205] court, and you shall \*contest it between yourselves. The case must

be one in which the fund is matter of contest between two parties, and in which the litigation between those parties will decide all their respective rights with respect to the fund.[2] Here Thodey puts the estate up to sale; Cutts becomes the purchaser, and pays a deposit. The plaintiff then, by the direction of Thodey, puts the estate up again; and Vickers becomes the purchaser, and pays a deposit. Now, what is there in common between the first and second purchasers? This, it is true, is in common between them, namely, the question of which is to be the purchaser of the estate; but the question here is, who is entitled to the deposits. The suit of Cutts will decide whether Cutts is to be the purchaser: and if Cutts succeeds, Vickers will be entitled to have his deposit returned, as a matter of course. But if Cutts fails, Vicker's claim still remains, and nothing will be decided as to his rights; and, therefore, in that event, a new proceeding must be instituted between Vickers and Thodey. Is it possible, in this suit, to settle all the questions between these two sets of parties? No case has been

[1] *Matthewson v. Johnson*, 1 Hoff. Ch. Rep. 561.

[2] As to the office of an interpleading suit, see Wigram, V. C. in *Crawford v. Fisher*, 1 Haro, 441, quoted 4 Myl. & Cr. 323, n. 1.

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cited to justify such a suit; and I think that, in treating this case as coming before me adversely, I should be doing great prejudice to the practice of the court, if I were to allow this decree to stand. The bill, however, is a proper bill as between Hoggart, Cutts, and Thodey: there can, in that suit, be no question about Hoggart's conduct. He is a mere auctioneer employed to sell the estate, and has a right to make Cutts and Thodey determine between themselves which of them is entitled to a fund in which he claims no personal interest. The suit, however, cannot be sustained as to Vickers also; and if I am to decide which of the defendants, Cutts or Vickers, is to be dismissed from the suit, I have no hesitation in retaining Cutts, because he is the first purchaser, and because the case as to him is \*the more [\*206] simple. The bill therefore, must be dismissed as to Vickers, with costs; and as I am told that the two deposits are now mixed together in one fund in court, there must be an inquiry how much of the fund in court belongs to Vickers's deposit. That must be returned to Hoggart, and the injunction as to that deposit must be dissolved. Then there is a suit pending by Cutts for a specific performance; that suit will decide Cutts's right to the estate. I shall therefore order Cutts to proceed in his suit, with liberty to apply: of course, if he does not proceed, the other parties will apply.[3]

It was afterwards agreed between the parties that the sum of 135*l.* 12*s.* 8*d.* bank annuities was the amount which had been purchased with Vickers's deposit.

The decree, as finally drawn up, was as follows:

"His lordship doth order, that the plaintiff's bill do stand dismissed out of this court, with costs, as against the said defendant Charles Vickers, and with costs as to the other defendants, so far as relates to the said defendant Charles Vickers, and to the purchase and deposit by him in the pleadings mentioned; such several costs to be taxed by the master: and it is ordered that 135*l.* 12*s.* 8*d.*, part of the 277*l.* 12*s.* 4*d.* bank three per cent annuities, and 2*l.* 3*s.* 4*d.*, part of the sum of 20*l.* 16*s.* 3*d.* cash, respectively standing in the name of the Accountant General of this court, in trust in and placed to the credit of this cause, being the amounts that have arisen from the sum of 128*l.*, the deposit paid by the said Charles Vickers in the pleadings of the said cause mentioned, be transferred and paid to the plaintiff, Charles Lancelot Hoggart. And it is ordered that so much of the \*injunction granted in this cause [\*207] as relates to the defendants Winwood Thodey and Charles Vickers, in respect of the purchase and deposit of the said Charles Vickers, be dissolved. And it is ordered that the said injunction, as regards the defendants Winwood Thodey and John Cutts, be continued; and it is ordered that it be

[3] See *Cutts v. Thodey*, 13 Sim. 206; S. C. 1 Coll. C. C. 223, arising out of the same transaction, but not touching upon the questions discussed in the case *supra*. As to interpleader, in general, see *Jew v. Wood*, ante, 185, 196, n. 3; 2 Sim. & Stu. 64, n. 1; 2 Myl. & Cr. 24, n. 1; *Townley v. Deare*, 3 Beav. 213, 216.

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referred to the master to tax the plaintiff his other costs of this suit; and it is ordered, that so much of 141*l.* 17*s.* 8*d.*, residue of the said 277*l.* 12*s.* 4*d.* bank three per cent annuities, as, with 18*l.* 12*s.* 11*d.*, residue of the said sum of 20*l.* 16*s.* 3*d.* cash, will be sufficient to raise such last mentioned costs, be sold, with the privity of the Accountant General, and out of the moneys to arise by the said last mentioned sale and the said cash, it is ordered, that the said last mentioned costs of the said plaintiff, Charles Lancelot Hoggart, be paid to Mr. William Paterson, his solicitor, without prejudice to the question by whom the same shall be ultimately paid. And it is ordered, that the defendant John Cutts do prosecute his suit against the plaintiff, and the said defendants Winwood Thodey and Charles Vickers. And it is ordered, that the said respective sums of 20*l.* and 20*l.*, deposited with the registrar by the said defendants John Cutts and Charles Vickers, on setting down their petitions of appeal, be returned to them respectively. And his lordship doth reserve the consideration of all further directions; and any of the parties are to be at liberty to apply to this court as there shall be occasion."

Reg. Lib. A. 1840, fol. 856.

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[\*208] \*THE ATTORNEY GENERAL v. THE IRONMONGERS COMPANY.

1840: November 20, 23. 1841: January 23.

A testator gave the residue of his estate to an incorporated company in the city of London, upon trust to apply one moiety of the income to the redemption of British slaves in Turkey or Barbary, and one-fourth part to the support of charity schools in the city and suburbs of London, where the education was according to the church of England, not giving to any one above 20*l.* a year; and in consideration of the company's care and pains in the execution of his will, out of the remaining fourth part to pay 10*l.* a year to such minister of the church of England as should from time to time officiate in their hospital, and the rest to necessitated decayed freemen of the company, their widows and children, not exceeding 10*l.* a year to any family. And the testator positively forbade his trustees to diminish the capital by giving away any part of it, or to apply the income to any use or uses but those mentioned in his will. The income of a moiety of the residue having, for several years, been suffered to accumulate, in consequence of there being no British captives in Turkey or Barbary, an information was filed for the administration of the charity estate, including the accumulations of that moiety; and it appearing that there were then no such British slaves to be redeemed, and no other object having been suggested which, in the opinion of the court, bore any resemblance to the redemption of such slaves, it was declared that, after setting apart a certain sum out of that moiety and its accumulations, to provide a fund for the redemption of any British subjects who might thereafter be held in slavery in Turkey or Barbary, the income of the surplus of that moiety and its accumulations ought to be applied in supporting and assisting charity schools in England and Wales, where the education was according to the church of England, but not to an amount of more than 20*l.* per year to any one school; and it was referred back to the master to settle and approve a scheme for that purpose.

Under a reference to approve a scheme for the application of charity funds, the master has no authority to allow, still less to invite any person to intervene in the inquiry, who is not a party to the cause. If any such person is desirous of proposing a scheme of his own, his proper and only course is to apply to the court for leave so to do.



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In an information, the Attorney General, and not the relator, is the party prosecuting the cause : and, therefore, the court will not allow counsel for the relator to be heard in any other character than as counsel for the Attorney General.

THOMAS BETTON, by his will, dated the 15th February, 1723, gave all the residue of his estates to the Ironmongers Company, in the city of London, and their successors upon trust, to apply one moiety of the income to the redemption of British slaves in Turkey or Barbary, one-fourth part to the support of charity schools in the city and suburbs of London, where the education was according to the church of England not \*giv- [\*209] ing to any one above 20*l.* a year ; and, in consideration of the company's care and pains in the execution of his will, out of the other fourth part, to pay 10*l.* a year to such minister of the church of England as should from time to time officiate in their hospital, and to pay the rest to necessitated decayed freemen of the company, their widows and children, not exceeding 10*l.* a year to any family. And the testator positively forbade his trustees to diminish the capital by giving away any part of it, or to apply the interest to any other use or uses than those mentioned in his will.

There being for many years no British slaves in Turkey or Barbary, the company allowed the moiety of the income applicable to that purpose to accumulate. And, in the year 1829, the accumulation having amounted to upwards of 100,000*l.* three per cent annuities, this information was filed for the purpose of having the charity estate, including the accumulations before mentioned, administered under the direction of the court.

By the decree made at the hearing of the cause, on the 19th of July, 1830, it was referred to the master to inquire whether the whole or any part of the income of the moiety, applicable to the redemption of British slaves in Turkey or Barbary, and the accumulations thereof, could then be applied to that object ; and, if not, he was to consider what would be the most proper application of it, or of so much of it as could not then be so applied, regard being had to the testator's will, and he was to approve of a scheme accordingly, and to inquire whether such scheme could be carried into effect without the aid of parliament.

The master, by his report of the 20th July, 1833, made in pursuance of that decree, after stating that \*it did not appear to him that [\*210] there was then any British subject held in slavery in Turkey or Barbary ; and that, therefore, no part of the moiety in question could be applied to the object mentioned in the will ; proceeded to certify that, inasmuch as there had been British subjects held in captivity in Turkey and Barbary, he was of opinion that it would be fit and proper to set apart 7000*l.* three per cent. annuities, in order that the income thereof might form a fund to provide for the redemption of any British subjects who might thereafter be detained in slavery either in Turkey or Barbary. He then certified his approval of a scheme which had been proposed by the company, for the application of the income of the surplus of that moiety, and its accumulations, to the other ob-

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jects mentioned in the will ; and he further certified, that he was of opinion that such scheme could be carried into effect without the aid of parliament.

Upon the cause coming on to be heard for further directions, before Sir J. Leach, M. R., in the month of November, 1833, his honor confirmed that part of the master's report which related to the appropriation of the 7000*l.* three per cent. annuities,<sup>(a)</sup> but declared that the court had no jurisdiction to apply the income of the surplus of the moiety in question, and the accumulations thereof, to any purpose inconsistent with the intentions of the testator expressed in his will with respect to the redemption of British captives ; and his honor referred it back to the master to settle and approve of a proper scheme to be submitted to parliament, for the application of the income of such surplus and accumulations.

[\*211] \*As to that declaration, however, and the reference consequent upon it, the order of Sir J. Leach was reversed, upon appeal, by Lord Brougham, who, by an order of the 21st November, 1834, remitted the cause back to be reheard on further directions by the Master of the Rolls, with a declaration that the court had jurisdiction to apply the income of the surplus of the moiety in question and the accumulations thereof, as near as might be to the intention of the testator, having regard to the bequest touching British captives, and also to the other charitable bequests contained in the will.

The cause being so remitted, came on to be reheard for further directions before Sir C. C. Pepys, M. R., who, by an order of the 1st May, 1835, referred it back to the master to review his report on the footing of that declaration.

The material substance of the master's separate report made in pursuance of that order, will be found sufficiently stated in the second volume of Mr. Beavan's Reports, p. 313, where the case is reported upon the hearing, before the Master of the Rolls, of exceptions taken by the defendants to that report, and of two petitions in relation to it, one presented by the relator, in the name of the Attorney General, and the other by the trustees of a charity called the Mico charity, upon which petition a separate order was made dismissing it without costs.

The relator having, in the name of the Attorney General, appealed from the order upon the exceptions ; and the trustees of the Mico charity having presented an appeal petition to the Lord Chancellor, praying that the orders made by the Master of the Rolls, on the exceptions and on their pe-  
[\*212] tition, might be discharged or \*varied, with a further prayer to the same effect as the prayer of the original petition ; those two appeals now came on to be heard together.

It will be convenient, however, before proceeding to the argument upon the merits, to dispose of a question which, in the course of that discussion, arose, with respect to the right of the trustees of the Mico charity to be heard

(a) A similar course appears to have been adopted in *The Attorney General v. The Bishop of Llandaff*, cited 2 Mylne & Keen, p. 586.

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in support of their petition; and, for that purpose, it will be necessary to state the circumstances under which those parties intervened, in the inquiry before the master, and, afterwards, upon the hearing before the Master of the Rolls, and, subsequently, upon this occasion, and which were these:—

The master, with a view to the prosecution of the inquiries directed by the order of the 1st of May, 1835, had caused advertisements to be published, inviting any society, incorporated or otherwise established as a permanent society for any charitable purpose, similar to or connected with the intention of the testator expressed in his will, to come in and establish its claim. In pursuance of those advertisements, claims were brought in on behalf of about seventy different charities, including the Mico charity, the trustees of which attended repeatedly before the master by counsel in support of their scheme; the result of which was, that the master reported conditionally in favor of the Mico charity, subject to the judgment of the court upon a point reserved; the claims of the other charities, with the exception of two for which some provision was recommended in another part of the report, being disallowed. Relying upon that finding in their favor, and without further leave of the court, the trustees of the Mico charity presented their petition to the Master of the Rolls, by whom they were allowed to be heard; and their petition was dismissed, \*as above mentioned, upon the merits. The [\*213] present appeal petition was presented upon the same ground, and without further authority from the court; but, upon their counsel proceeding to address the court next after the counsel for the relator, an objection was taken, both on the part of the relator and of the defendants, to their being heard at all.

Mr. *Bethell* and Mr. *Rolt*, who appeared for the trustees of the Mico charity, having been called upon by the Lord Chancellor to address themselves, in the first instance, to that objection, contended that if the mode of their intervention in the proceedings had been, in any respect, irregular, the irregularity consisted in the publication of the advertisements by the master, and not in the conduct of the parties who came in before him in pursuance of those advertisements: That if either the relator or the defendants, as parties to the cause, had felt themselves aggrieved by that course of proceeding, they ought to have made it the subject of an application to the court; and the trustees would then have had an opportunity of adopting the course, which perhaps would have been more strict and regular, of applying to the court, by petition, for leave to appear in person, or by counsel of their own, distinct from the counsel of the relator, in support of their particular scheme: That, having been induced, first by the act of the master, and afterwards by the acquiescence of the parties to the cause, to consider themselves duly and regularly admitted to a participation in the proceedings, it would be unjust to turn them round now upon a point of form, more particularly as the nature and details of their scheme were not stated in the master's report, nor were in any way brought under the view of the court, except by their peti-

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tion ; and consequently, as both the relator and the defendants were [\*214] adverse to their scheme, unless \*this petition were entertained, and the petitioners heard in its support, the court would have to decide upon the propriety of the master's finding, and upon the point which had been expressly reserved for its consideration, without having the means of knowing what was the nature of the scheme, or what were the grounds upon which the master had recommended its adoption : That by the conditional finding of the master in their favor they had acquired an interest in the fund in litigation ; and that, in that respect, their situation was analogous to that of creditors and legatees, whom it was the constant practice of the court to admit as parties to all proceedings in the cause in which the master's adjudication upon their rights was in question.

THE LORD CHANCELLOR, without hearing any argument in support of the objections, said that, so far as the right of the petitioners to be heard depended upon the finding of the master in their favor, they stood in no better situation than those parties whose claims the master had disallowed ; and that it was impossible to allow the petitioners to be heard on that ground, without giving a similar liberty to all the seventy charities which had carried claims into the master's office : That the case had no analogy to that of creditors or legatees : for the form of the master's finding in those cases was that the parties had or had not a title to or interest in the fund in litigation : whereas, in this case, all that the master had done was to suggest a scheme in favor of the petitioners. If the master had erroneously found that the trustees of the Mico charity were entitled to the fund, the court must have heard them, because the master would then have raised a question of title : and, however unfounded the master's opinion might have been, the court must have heard the grounds upon which he had proceeded, in order [\*215] to be perfectly safe in \*correcting the error. It was true, that the master had, by advertisements, called upon the petitioners to come in before him, as if they had a claim upon the fund ; and that the parties who now objected to their being heard had acquiesced in that course of proceeding. It would be in vain, however, for the court to endeavor to prevent expense in these proceedings, if it was to be in the discretion of the master or of the parties in the master's office to let in claimants without an order of the court. In inviting parties to come in, the master had fallen into a great error, and the parties so invited ought never to have been heard in the master's office at all. Where an inquiry of this sort was going on between the Attorney General and the trustees of a surplus fund, and any party thought he could aid the objects of the reference, and suggest a better plan than was likely to be suggested by the parties to the cause, his proper course (as had been admitted at the bar,) was to apply to the court for leave to intervene in the proceedings. That was not only the proper, but the only course ; and, therefore, as the petitioners had not adopted it, they could not be heard ; for

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if the door were opened to this case it would be impossible to shut it against others.

The petition of the trustees of the Mico charity was accordingly dismissed, and the argument upon the merits was confined to the appeal upon the exceptions.

Mr. *Cooper* and Mr. *Anderdon*, in support of the appeal, contended that the order of the Master of the Rolls, so far as it sanctioned the application of the moiety of the fund, the original object of which had failed, to the two other objects mentioned in the will, was, in effect, a revival of the scheme which had already been rejected by the court, and was at variance with the order of reference by which the master had been \*directed [\*216] to review his report, "having regard to the intentions of the testator as to the bequest touching British captives, and having regard also to the other charitable bequests in his will:" that the intent and meaning of that order evidently was to prescribe to the master the adoption of some scheme which would be in conformity with the established doctrine of *cy pres*, a doctrine which forbade the application of a charity fund to any object wholly dissimilar to that pointed out by the testator, until it had been ascertained that no analogous object could be found; and that there was no authority for the proposition, which appeared to be assumed by the Master of the Rolls, that a different rule applied in a case when the disappointed gift was coupled with others in the same will, from that which was admitted to exist in cases where the disappointed gift stood alone: that the authorities which would be cited in support of that proposition, with the exception of that of *Attorney General v. Bishop of Llandaff*,<sup>(a)</sup> which did not appear to have been litigated, were all cases in which the fund in question was devoted to charity generally, without any particular object being specified, and consequently could have no application to the present, until it should have been ascertained that there was not only a failure of direct objects of the bequest, but that there was no other charity more nearly resembling that which had failed than either of the others mentioned in the will; *Attorney General v. Whiteley*:<sup>(b)</sup> that, in the present case, there was not only no finding of the master or declaration of the court to that effect, but it was obvious that many objects might be suggested more nearly related to the redemption of captives in Barbary than either the schools in the neighborhood of the city of London, or the decayed \*freemen of the Ironmongers Company: for in- [\*217] stance, considering that it was owing to the naval victory at Algiers, that there were now no direct objects to which this fund could be applied, and that its accumulation had in fact commenced from the date of that event, any of the various naval charities in the country, and particularly those which were now affording relief to sailors who had fought in that battle, naturally suggested themselves as more nearly related to the original purpose than either of the other charities mentioned in the will. At all events, it was a

(a) See 2 Mylne & Keen, 586.

(b) 11 Ves. 241; see page 251.



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conclusive objection to the scheme which had been adopted, that it would have the effect of narrowing the operation of a charity, originally general in its nature, to a particular district and a limited class of objects; whereas the principle of the court was to adhere, as far as possible, to the general character, even where it was obliged to vary the particular form, of the application pointed out by the testator; and that wherever that was not practical, its tendency was to select such a scheme as should extend the application of the fund, rather than to restrict it within narrower limits.

Sir *William Follett*, Mr. *Wigram*, and Mr. *Sharpe*, for the Ironmongers Company, contended that the jurisdiction of the court in cases of this kind was much more discretionary than the argument of the appellant seemed to suppose; and it was only when the exercise of that discretion was clearly at variance with some established principle of law that an appellate judge would feel himself justified in interfering: that if, in adjudicating between the rival claims of several objects, all of which were so remote from the original purpose as those which had been suggested, the court were to speculate and refine upon the different degrees of their approximation to the expressed intention of the testator, there would be no end to the diversities of opinion which different judges would entertain; and the consequence would be, that in the attempt to apply the funds to such a purpose as should be most in conformity with the will of the donor, the fund itself would be wholly exhausted in litigation.

They then pursued the same line of argument, and cited the same authorities in support of the scheme of the defendants as had been insisted upon in the court below.<sup>(a)</sup>

On the conclusion of the argument for the defendants,

Mr. *Wray* stated that he appeared for the Attorney General, in a character distinct from the relator, and that he should support the order of the Master of the Rolls, unless the court should allow him to do that which he had done at the Rolls, namely, support the master's report upon the case of the Mico charity as well as the others which were there referred to: but

THE LORD CHANCELLOR said, that, on an information, the Attorney General was the party prosecuting the cause, and was the only party whom the court could recognize in that character; and therefore that his lordship could not hear the Attorney General against the relator, or the relator against the Attorney General.[1]

Mr. *Cooper* was then heard in reply.

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1841: Jan. 23.—THE LORD CHANCELLOR:—The effect of the order

(a) See 2 Beav. 320, 321.

[1] In an information by the Attorney General at the instance of a relator, the Attorney General ought not to appear otherwise than in support of the information. *Attorney General v. The Ironmongers Company*, 2 Beav. 313, 329. It is not necessary that the relator in an information should have an interest in the subject of the suit. *Attorney General v. Rickards*, 1 Phillips, 383.



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now under consideration, is to declare that the moiety of the income of the property by \*the will devoted to the redemption of British [\*219] slaves in Turkey and Barbary ought (the failure of such gift for want of objects being established) to be applied to the two other objects named in the will. The first question I have to consider is, whether that application of the property ought to be established ; and, before I advert to the terms of the will, I must shortly observe upon the former order, from which it must, I think, be inferred that this mode of application has hitherto been disapproved by all the other judges by whom this question has been considered.

The decree of 1830 directed the master, if he found that there were no objects of the first gift, to inquire how that moiety of the income destined for it should be applied, regard being had to the will, and to approve of a scheme accordingly, and to inquire whether it could be carried into effect without the aid of parliament. The master reported in favor of a scheme proposed by the defendants, by which this moiety of the income was to be equally divided between the two other objects mentioned in the will, namely, the second, charity schools in the city and suburbs of London, where the education is according to the church of England, no one to have more than 20*l.* a year ; and the third, necessitous decayed freeman of the city, their widows, and children ; and he reported that such scheme could be carried into effect without the aid of parliament.

When the cause came before Sir J. Leach, in November, 1833,(a) he differed from the master in one respect, and declared that this court had no jurisdiction to apply the funds to any purpose unconnected with the intention of the testator, and referred it to the master to approve of a scheme to be submitted to parliament for the \*application of this moiety of [\*220] the income. It appears to me that his honor could not have made this order without being of opinion that the scheme approved by the master, was contrary to the intention of the testator, and one which ought not to be adopted. If he had approved of it, being, as he was, of opinion that the court had not jurisdiction to carry it into effect, the obvious course would have been to have put the case in a course of procuring the sanction of parliament to an approved scheme, and not to send it back to the master to settle another scheme, with a view of submitting such other scheme to parliament. I am aware that his honor thought that the direction in the will, that the income of the property should not be applied to any other purpose than that what was thereby mentioned and directed, was operative in excluding the jurisdiction of this court ; but that went only to the question of jurisdiction, and must have been as applicable to any other scheme as to that approved by the master.

When the case came before Lord Brougham in November, 1834,(b) his lordship differed from Sir J. Leach as to the question of jurisdiction, and re-

(a) See 2 Mylne & Keen, 576.

(b) See 2 Mylne & Keen, 581.

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1841.—The Attorney General v. The Ironmongers Company.

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versed that part of his decree, and declared that the court had jurisdiction to apply the surplus income of the moiety of the charity property in question as near as might be to the intention of the testator, having regard to the bequest touching British captives, and also the other charitable bequests in the will; and it was referred back to the Rolls to be reheard on further directions upon the master's report of the 20th of July, 1833, on the footing of the declaration thereby made.

Lord Brougham being of opinion that the court had jurisdiction, [\*221] and that the prohibitory words in the will "did not necessarily exclude the other charities mentioned in it, would, if he had approved of the scheme sanctioned by the report of the 20th of July, 1833, have merely confirmed and acted upon that report; for, in that case, he would have concurred in all that the master had done: but such was not the course he took; for, in the report of his judgment, (a) he says that it must be referred back to the master to approve a proper scheme for the application of this surplus income of the moiety of the property.

When the case came before me at the Rolls on the 1st of May, 1835, I had the greatest difficulty in making an order, consistently with what had been before done; but finding that Lord Brougham's order varied the directions of the decree of 1830 (though not, in my opinion, in any thing material,) as to what the master was to have regard to in settling a scheme, I could not act upon a report made before such varied directions were given. I found it, therefore, necessary to send the case back to the master, with the declaration in Lord Brougham's order, to review his report. I did not feel myself competent to deal with the report already made. What I said, therefore, with reference to the scheme approved by that report may be considered as extrajudicial. I did, however, express an opinion that there were decided objections to the scheme so approved of. That scheme, which has been, in substance, adopted by the present Master of the Rolls, comes before me with a sanction and authority which demands the utmost respect and the greatest consideration, which I have thought it my duty to give to it, but without being able to satisfy myself that my former opinion was incorrect.

[\*222] "It is obviously true that if several charities be named in a will, and one fail for want of objects, one of the others may be found to be *cy pres* to that which has failed; and, if so, its being approved by the testator ought to be an additional recommendation; but such other charity ought not, as I conceive, to be preferred to some other more nearly resembling that which has failed. That point, however, is not open upon the present report, which was made under an order directing the master, in settling a scheme, to have regard, as near as may be, to the intention of the testator as to the bequest contained in his will touching British captives, and having regard also to the other charitable bequests in the said will. By this I un-

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1841.—The Attorney General v. The Ironmongers Company.

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derstand that the first subject to be considered is the intention of the testator, to be discovered from the gift in favor of British slaves; subordinately to which, and, if possible, consistently with it, the other charities are to be considered; and this, I conceive, would have been the course to be pursued, if there had not been any such special directions.

Assuming this to be the rule, it appears that the first charity is most general in its objects, being applicable to all British persons who should happen to be in a particular situation; that the second is limited to persons in London and its suburbs; and that the third is confined to freemen of a particular company in London. It would seem, therefore, that although there is no possibility of benefitting the British community at large in the mode intended by the testator, none being found in the situation he anticipated, that it would yet be more consistent with his intention that the same community should enjoy the benefit of his gift in any other way than that it should be confined to any restricted portion of such community.

\*In considering the manner in which such benefit should be con- [\*223]ferred, it is very reasonable and proper to look to other provisions in his will, in order to see whether he has indicated any preference to any particular mode of administering charity. If a testator had given part of his property to support hospitals for leprosy in any part of England, and another part to a particular hospital, it would be reasonable to adopt the support of hospitals as the mode of applying the disposable funds; but there would not be any ground for giving the whole to the particular hospital. The only case referred to as giving any countenance to such a principle is the unreported case of *Attorney General v. Bishop of Llandaff*, cited 2 Mylne & Keen, 589, and stated in the master's report in *Attorney General v. Gibson*, dated 23d of July, 1835.(a) It is, however, to be observed that there is no appearance of that case having been discussed; and that the trust which failed was as unlimited as to the description of slaves as the present; and that the scheme may have been adopted upon the principle I act upon in adopting the second gift in this testator's will, as indicative of his preference for a particular charity, and therefore to be preferred, in the absence of any other more resembling the object of that which has failed. It may also be observed, that the scholarships in that case appear to have been open to every description of candidate. If Lord Eldon had thought this the correct principle to act upon, he would, in *Mills v. Farmer*,(b) have given the whole funds to the two charities named, instead of referring it to the master to approve of a scheme for distributing the funds, having regard, it is true, to those two objects named, which was proper for the purpose of ascertaining what \*description of charity was most likely to be in con- [\*224]formity with the views of the testator. To assume, because a testator names two charities in his will, that he would have given the amount

(a) See this case mentioned in 2 Beav. 317, n.

(b) 19 Ves. 483.

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1841.—The Attorney General v. The Ironmongers Company.

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of both legacies to one, if he had foreseen that the other could not be carried into effect, and therefore to give the provision intended for the object which fails to the other, is or may be totally inconsistent with the doctrine of *cy pres*. The two objects may be wholly unconnected; and there may be other charities closely connected with that which the testator intended to favor; but, as indicative of the testator's general views and intentions, it may be very proper to observe the course he has pursued in his gifts to other charities. I think, therefore, that in the absence of any objects bearing any resemblance to the object which has failed, it is very proper to look to the second gift, but only as a guide to lead to what the testator would probably have done himself, and therefore not to be followed further than may be proper to attain that object; but, with regard to the third object, I cannot see any grounds for considering it as indicative of the testator's general views, or any reason for supposing that he would, under any circumstances, have wished that provision increased. The objects are restricted within the narrowest limits; and it is, in that respect, in direct contrast with the extended nature of the first gift: but what appears to me to be conclusive against any reference to the third gift is, that the testator has expressed his reasons for the gift, which can have no application to the moiety undisposed of. He says that the third gift is in consideration of the company's "care and pains in the execution of his will." It is true that this compensation is given to the company in the shape of a provision for necessitous decayed freemen of the company, their widows and children, and, no doubt, is a charity; [\*225] but in looking for evidence of the testator's general views and intentions, with reference to the kind of charities to be favored, it cannot be inferred that he preferred the distressed freemen of the company to all others, because he made a provision for them, as a consideration for services to be performed by the company; and this consideration has already increased in a greater ratio than the income of the property, it being well known that a large property may be administered at a less per centage than a small one. I am, therefore, of opinion that this third gift cannot be referred to, for any purpose, in settling a scheme for the application *cy pres* of the funds intended for the first: but I think the most reasonable course to be adopted is to look at the second gift, as indicative of the kind of charity preferred by the testator, but making it as general in its application as the first was intended to be, that is, open to all who might stand in need of its assistance; which leads to this conclusion, that it should be applied in support of charity schools, without any restriction as to place, where the education is according to the church of England, but not to exceed 20*l.* per year to any one.

I see no ground for applying any part of the funds for the benefit of the pensioners in Greenwich Hospital, who were present at the battle of Algiers, or to the Seamens Hospital Society, or to the Royal Naval Benevolent Society, or to the Royal Naval School, or to the school attached to Greenwich

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Hospital, unless such schools fall under the description of schools to which I have before said I thought the funds ought to be applied, in which case they may be entitled to a very favorable consideration.

I am also of opinion that the Mico charity is not one to which these funds can be applied upon the doctrine of *cy pres*. The legacy in that case was “to redeem \*poor slaves in what manner the executors [\*226] should think most convenient.” In this there was no restriction as to the description of slaves, or to the countries in which the slaves were to be looked for: and when, at the date of the report in 1835, made in the cause of *The Attorney General v. Gibson*,<sup>(a)</sup> upon a reference to approve of a scheme to carry the trust into effect, or if that should be found to be impracticable, then to approve of a scheme as near to the intent of the will as could be, regard being had to the existing circumstances, and an order of 4th of May, 1829, by which the master was to be at liberty to receive a scheme, to be laid before him on the part or behalf of the Society for the Conversion and Religious Instruction of the Negro Slaves in the British West India Islands, it appeared that there were not within any part of the British dominions any poor slaves to be redeemed, but that there were in the colonies many thousands of human beings from whom the odious appellation of slaves had been removed, but whose state was very far short of that of freemen, from whose bodies the chains of slavery had been struck, but whose minds and morals were still in that state of degradation which is inseparable from the unfortunate situation from which they had recently been in part rescued—it was proposed to the master to apply, and he approved of a scheme for the application of the funds to the completion of that holy work, by assisting in the education of those poor beings.

If, before the slavery abolition act, these funds could have been properly applied in procuring the redemption of slaves in the colonies, the proposed application for the benefit of the apprentices was \*doubtless [\*227] *cy pres* to the intention of the donor; but that has no application to the present case, in which the funds could not, at any time, have been so applied.

There is, necessarily, great latitude in exercising the jurisdiction over charity funds, when the direct object of the donor fails; and, therefore, very different opinions may be formed upon that subject in the same case. A charity may be *cy pres* to the original object, which seems to have no trace of resemblance to it, but which may be very properly adopted if no other can be found having a nearer connection. The providing for the education for the poor, it may be said, has no resemblance to the object of the charity which has failed; but none has been suggested which unites those two qualities which induce me to adopt it, namely, the application of the funds in a manner of which the testator has expressed a preference—for the benefit of all who may stand in need of them.

(a) See 2 Beav. 317, n.



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 1841.—Shuttleworth v. Howarth.
 

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I propose, therefore, to reverse the decree of the Master of the Rolls, except so much of it as declares that there are no direct objects to which the gift respecting British captives can be applied, and in lieu of the part so reversed, to declare that the half part of the interest and profits of the testator's property, which by his will is directed to be applied in the redemption of British slaves in Turkey and Barbary, and the accumulations thereof, ought to be applied in supporting and assisting charity schools in England and Wales, where the education is according to the church of England, but not to an amount of more than 20%. per year to any one school, and refer it back to the master to settle and approve a scheme for that purpose. The relators and other parties to the suit must have their costs out of the fund, but [\*228] the other parties who have appeared cannot \*have any costs; their appearance and their taking part in these proceedings is irregular; but, considering the manner in which they were invited into the master's office, and the circumstances under which these proceedings were taken, I cannot order them to pay any costs.[2]

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 SHUTTLEWORTH v. HOWARTH.

1841: April 19.

A residuary gift in a will is a gift of all that shall remain after payment of debts and legacies, and the expenses incident to the execution of the will. And therefore, where a testator gave his residuary estate, both real and personal, upon trust to be divided in certain proportions among certain classes of persons, although some of the classes turned out to be much more numerous than others, it was held that the costs of establishing the claims of the individuals composing the different classes were not to be paid exclusively out of the portions attributable to such classes respectively, but that the costs of all the persons who established their claims as falling within the several classes were to be paid indiscriminately out of the residuary fund before any apportionment of it took place.

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[2] Where a legacy was given to A. B., "to be applied to the use of" a certain Catholic College, and A. B. died in the testator's lifetime, the court, on being satisfied of the respectability and permanent character of the institution, ordered the legacy to be paid to the president of the college, who was the officer intrusted with the management of its pecuniary affairs, without requiring any scheme to be settled, although the Attorney General asked for one. *Walsh v. Gladstone*, 1 Phillips, 290. A bequest of stock was made to the "Society for Bettering the Condition of the Poor," upon trust to apply the income to the payment of the house-rent of seven or more country laborers in the principality of Wales, selected in a certain manner; and a bequest of other stock to the "Society for the Encouragement of Female Servants," upon trust to distribute the income annually in gratuities to servants in the same principality, selected in a certain manner. The two societies renounced the respective trusts, and disclaimed the legacies. It was held, that the discretion of the trustees was not in these cases of the essence of the trust; that the trust being originally created for certain definite objects, and not a gift to charity generally or indefinitely, it was not a case in which the disposition of the fund required the authority of the sign manual: and that the court would carry the trust into effect by means of a scheme. *Reeve v. Attorney General*, 3 Haro, 191. See further as to the execution of charitable trusts; *Simon v. Barber*, 5 Russ. 112; *Hayter v. Tregg*, id. 113, 115, n. 1; *Bennett v. Hayter*, 2 Beav. 81. As to the costs in suits respecting charities; see *Attorney General v. Cullum*, 1 Keen, 104, 119, n. 2; *The Attorney General v. Caius College*, 2 Keen, 150; *The Attorney General v. Kerr*, 2 Beav. 420.



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1841.—Shuttleworth v. Howarth.

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THE order made by the Vice-Chancellor upon the hearing of this cause for further directions, and that made by the Lord Chancellor upon the appeal of certain persons who, not being parties to the suit, had gone in under the decree and established their titles before the master, will be found stated, together with nearly all the facts and circumstances of the case which are material for the present purpose, in the fourth volume of Messrs. Mylne & Craig's Reports, p. 492. It is only necessary to add to that statement, that it appeared, by the master's report, that of the 332 descendants of the testator's paternal uncle and aunt whose claims had been allowed by him, 213 were descendants of the testator's uncle John Kay, and 119 were descendants of his aunt Mary Kay; and that of the 144 descendants of the testator's maternal uncle and aunts, 32 were descendants of his uncle Thomas Kay, 110 were descendants of his aunt Katherine Kay, and two only, of whom Margaret Southam was one, were descendants of his aunt [\*229] Ann Kay.

The effect of the above mentioned order of the Lord Chancellor having been to throw a large additional amount of costs upon the general residuary fund, another petition of appeal was presented by the representatives of Margaret Southam, who had died, praying that the Vice-Chancellor's order, on further directions, and the order of the Lord Chancellor, on the former petition of appeal, might, respectively, be varied, so far as they directed the payment of the costs of the several descendants or representatives of descendants of the testator's uncles and aunts in the manner therein mentioned, and that the funds arising from the residuary real and personal estate of the testator might, after payment of the costs of his executors, be divided and apportioned among the several descendants of the testator's uncles and aunts in the manner directed by the will, prior to the payment of any other costs; and that it might be declared that the costs of each class of such descendants, or of the personal representatives thereof, ought only to be charged upon and made payable out of the portion of the fund, so far as it would extend, to which such class was entitled, and that the same might be ordered to be paid thereout accordingly.

The appellants' counsel contended that, in making the apportionment of costs which was now asked, the court would only be following out to its legitimate consequences the principle which had been laid down in the case of *Hutchinson v. Freeman*,<sup>(a)</sup> and which had been adopted, to a certain extent, in his lordship's decision upon the former appeal in this cause; for that if \*all the persons whom the master had now found to be en- [\*230] titled had been originally made parties to the suit, the fund would have been apportioned amongst the different classes in the first instance, and then each portion of the fund would have had to bear the expense of making out the title of the parties claiming to participate in it, which was exactly what was sought to be done by this appeal.

(a) 4 Mylne & Craig, 490.

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 1841.—Shuttleworth v. Howarth.
 

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[THE LORD CHANCELLOR said that that state of things could not possibly have happened because the court would never declare a particular class of persons entitled to a portion of a fund, before it had ascertained whether there were any other individuals answering to that class in existence.][1]

They then cited the cases of *Basevi v. Serra*,<sup>(a)</sup> and *Wallis v. Williams*,<sup>(b)</sup> as authorities for the principle, that where several persons or classes of persons were entitled to integral portions of a fund, each portion ought to bear the expense of establishing the title of those individuals to whom it belonged.

[THE LORD CHANCELLOR said, that the case of *Basevi v. Serra* did not apply, because the costs in that case were occasioned by the legatee having incumbered his share; whereas, here, the difficulty was created by the testator himself.]

Lastly, they argued that the effect of his lordship's order on the former appeal would be at variance with the expressed intention of the testator, inasmuch as throwing the costs of all the five classes of descendants in-  
[\*231] discriminately upon the general fund would be \*practically equivalent to a distribution *per capita*, instead of *per stirpes*: at all events, it would be making the two descendants of Ann Kay pay a share of the expense of establishing the title of the 474 descendants of the other uncles and aunts.

On the other side, it was contended, that the costs of ascertaining the individuals designated by the testator were part of the costs of executing his will, which, by the general rule of the court, were payable out of the estate, before any distribution of the residue could take place; Beames on Costs.<sup>(c)</sup> An objection of form was also taken to the appeal, as being a second rehearing of the Vice-Chancellor's order, which could only be had by special leave of the court.

THE LORD CHANCELLOR:—In point of form, the petitioners are right: because they were respondents only on the former appeal; and the point now raised, and which they have a clear interest in raising, was not then under my consideration. But, with respect to the merits, I see no reason for departing, in this instance, from the established rule of the court. The petition proceeds upon this, that heavy expenses have been incurred in the master's office, in prosecuting inquiries respecting the title of some of these classes of legatees, in which the appellants have no interest; and it is therefore contended, that the payment of those expenses ought to be provided for in such a manner as to throw them upon the shares of those parties only for whose benefit they were incurred. It would be difficult, however, to reconcile that principle with the rule which the court has acted upon in  
[\*232] analogous cases, which is, that the costs \*of administering the estate

(a) 14 Ves. 313; and 3 Mer. 674, see 676.

(b) Beames on Costs, App. No 1.

(c) P. 14.

[1] *Caldecott v. Caldecott*, ante, 183, 184, and n. 1, *ibid*.

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1841.—Shuttleworth v. Howarth.

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are to be paid out of the estate before any distribution of it takes place. Mr. Beames, in his book on costs,<sup>(a)</sup> puts two instances of a suit being rendered necessary by the circumstances of a particular legacy, in both of which that rule has been applied. The first is where the difficulty has arisen from the infancy of the legatee; the second is, where the legacy having been limited to several persons in succession, it has become necessary to institute a suit for the purpose of securing the fund. How are those cases to be distinguished in principle from the present? Take the case where the residue is undisposed of. It is not attempted to be shown that, in that case, the principle of apportionment which is now contended for has ever been applied, as between different branches of next of kin: and yet, if there were a difference between the cases, there would seem to be more reason for its application in that case than in the present, inasmuch as the difficulty here having arisen from the testator's own act, it would seem to be more fit that his estate should bear the expense occasioned by it; but there is, in fact, no such difference, because what is to be distributed in both cases is the residue, and the residue is that which remains after all the expenses of administering the estate have been paid. For the purpose of ascertaining what expenses were understood to be included in that description, I inquired, on the former occasion, what principle was adopted in the taxation of costs in the master's office, where legatees or persons claiming as a class succeeded in establishing their title under a decree for the administration of an estate, and I was informed that the master included in the taxation all the costs incurred in the office; not the costs incurred out of doors in collecting information as to the \*pedigree of the party, not the costs of private inquiry, but [\*233] the costs of proceedings in the suit. Those have always been considered as part of the costs of administering the estate, and as such are to be paid out of the estate before any distribution takes place. That is the established rule of the court, and I can see no particular hardship in its application to the present case. The appeal must therefore be dismissed with costs.[2]

Mr. *Wigram*, Mr. *Stuart*, Mr. *Kenyon Parker*, Mr. *Spence*, Mr. *Geldart*, and Mr. *Freeling*, were for the different parties.

(a) See p. 14.

[2] As all the residuary legatees are merely volunteers, there is no reason why unless under peculiar equitable circumstances, the general rule should be departed from, in favor of an individual volunteer, or a class of volunteers.

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 1841.—Brooks v. Purton.
 

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## BROOKS v. PURTON and others.

1841 : August 11.

That part of the 10th order of December, 1833, which provides that in every cause for an injunction to stay proceedings at law, if the defendant do not plead, answer, or demur to the plaintiff's bill within eight days after appearance, the plaintiff shall be entitled, as of course, upon motion, to such injunction, includes amended bills as well as others. And the 3d order of May, 1839, which requires that applications for an injunction upon amended bills shall, in certain cases, be supported by an affidavit of the truth of the amendments, relates only to cases in which the injunction is applied for upon amendments made in the bill after an answer to it has been put in. And, therefore, when the bill has been amended before answer, the plaintiff may obtain an injunction under the provisions of the 10th order without any affidavit of the truth of the amendments.

AFTER the defendant Purton had appeared to the original bill in this cause, the plaintiff amended it, and then the defendant put in a plea to the amended bill. The plaintiff submitted to the plea, and amended the bill a second time. The defendant then appeared to the bill as so amended, and demurred. The plaintiff submitted to the demurrer, and on the 1st of July, amended the bill a third time. On the 5th of July, the defendant appeared to the [\*234] bill as so amended ; \*and on the 19th of July, no answer, plea, or demurrer having been put in, the plaintiff obtained an order for the common injunction, as of course, without any affidavit of the truth of the amendments.

On the 4th of August, the Vice-Chancellor, upon the motion of the defendant Purton, discharged that order, and dissolved the injunction with costs.

The plaintiff now moved, by way of appeal, before the Lord Chancellor, that the order of the Vice-Chancellor of the 4th of August might be discharged, and that the defendant Purton might pay the costs of the motion upon which it was made.

Mr. *Bethell* and Mr. *Parry* in support of the appeal motion.—The Vice-Chancellor discharged the order for the injunction upon the ground that it had been obtained without an affidavit verifying the amendments, considering the case to be within the third order of May, 1839 ;(a) but that order clearly relates only to applications for an injunction upon amendments made after an answer has been put in to the original bill, and not to cases in which the amendments have been made before answer. The word “afterwards”

in that order must have some meaning, and it is only by referring it [\*235] to the \*word “answer” that the preceding part of the clause can be

(a) This order is in the following words:—“ That in case an injunction to stay proceedings at law shall be prayed for by the bill, and shall either not be obtained, or, having been obtained, shall have been dissolved, upon the merits stated in the answer, and the plaintiff shall afterwards amend his bill, and the defendant shall not plead, answer, or demur to the amended bill within eight days after appearance, the plaintiff shall be entitled to move for an injunction, upon affidavit of the truth of the amendments.”

1841.—*Brooks v. Purton.*

made sensible. It will be said, however, that if the case is not within the third order of May, it falls within the tenth order of December, 1833 ; and that, according to that order, as construed by the Vice-Chancellor in *Lee v. Ravenscroft*,<sup>(a)</sup> an injunction cannot be obtained upon an amended bill until the expiration of five weeks from the time of the defendant's appearance. Now it is true that that case appears to have been decided by his honor after conferring on the subject with your lordship ; but it is impossible not to suppose that the opinion there attributed to your lordship—that the word “ bill ” in that part of the tenth order which relates to injunction causes applied only to original bills—must have been the result of some misapprehension.

[THE LORD CHANCELLOR :—I have no recollection of having ever expressed any such opinion : it is quite sufficient for a judge to be responsible for what he says in his own court, and nothing is more likely than that a misapprehension should occur on one side or the other in communications of that kind out of court.]

The term used is general, and is sufficient to embrace all the different kinds of bills specified in the preceding clause. Besides, that such a limited construction cannot be the correct one, is evident, from considering what the practice was when that order was made, and what was the object of that order. The intention of the learned judges who framed that order was simply to abolish the old orders for time, and, consistently with that [\*236] object, to retain the existing practice, in injunction causes, which nobody complained of. Now, the old practice in these suits was, that the plaintiff was entitled to an injunction upon the defendant's being in default, subject only to this condition, that where an answer had been put in and the bill was afterwards amended, it was necessary to make a special application upon an affidavit verifying the amendments, *James v. Downes*,<sup>(b)</sup> *Vipan v. Mortlock* ;<sup>(c)</sup> and all that the 10th order did or was intended to do, was, while it abolished the orders for time in all cases, to retain the old period of eight days in injunction bills, as that, at the expiration of which, if the defendant did not, in the meantime, plead, answer, or demur, he was to be considered as in default. It may be difficult, perhaps, to understand what necessity there was, after that provision, for the 3d order of May, 1839 ; because, when once the period of default was fixed, all the other incidents of applications for injunctions which existed under the old practice would attach of course, and, amongst others, the necessity for an affidavit where the application was made upon an amended case, after the equity of the original case had been denied by an answer ; but it is sufficient for the present purpose to say, that whatever may have been the object of that order, it does not apply to a case like the present ; and that, as there is nothing in the old

(a) 6 Sim. 474.

(b) 18 Ves. 522.

(c) 2 Mer. 476.

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 1841.—*Brooks v. Purton*.
 

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practice, or in the provisions of the 10th order, which requires an affidavit in support of amendments made before answer, no such affidavit was requisite in the present case.

*Mr. Wakefield and Mr. Cooper, contra.*—The interest of the suitors requires that the general orders should be construed according to their [\*237] plain and obvious meaning; but the construction of the third order of May, 1839, which is now contended for, would require that several words should be inserted which are not now to be found in it.

[THE LORD CHANCELLOR:—That construction would be satisfied by reading the words “or having been obtained, shall have been dissolved,” as if they were in a parenthesis.]

It is well known that that order was made for the purpose of obviating the inconvenience occasioned by the judicial construction put upon the tenth order of December, 1833, by the decision in *Lee v. Ravenscroft*, by which it was held that the word “bill” in that part of the order which has been referred to, meant an original bill only; and it certainly is impossible to say, as is now argued, that that word is so general as to embrace all the different kinds of bills before spoken of, for it clearly cannot refer to a bill of revivor, which is one of them.

[THE LORD CHANCELLOR:—If, however, it means original bills only, what will you do with supplemental bills which pray for an injunction? can it have been intended that one time should be fixed for obtaining an injunction upon them, and another upon original bills? The Vice-Chancellor seems to have thought that the eleventh order necessarily referred to original bills only, but I do not see why that should be so, as the eleventh order clearly refers to everything which the tenth order refers to.]

*Mr. Bethell*, in reply.

[\*238] \*THE LORD CHANCELLOR:—To adopt Mr. Wakefield’s construction of the third order of May, would be to construe that order by leaving out a great part of it; for if you refer the word “afterwards” to the filing of the original bill, as his construction would require, all the clause, “and shall either not be obtained, or having been obtained shall have been dissolved, upon the merits stated in the answer,” will be made wholly insensible. It is clear, however, that these words must have some meaning, and the only way of making all parts of the sentence consistent is by reading it in the manner I have suggested, as if the words “or having been obtained shall have been dissolved,” were in a parenthesis; according to that mode of reading it, the order will apply, in terms, to those cases only where, the equity for an injunction contained in the original bill having been effectually displaced by the answer, the plaintiff afterwards introduces a new case by amendment; and the order provides that in those cases the plaintiff shall be entitled to move for an injunction upon affidavit of the truth of the amendments, unless the defendant shall plead, answer, or demur to the bill within eight days after appearance. Why was he to plead, answer, or demur with-



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1841.—Brooks v. Parton.

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in that time, if the case was not within that part of the tenth order which applies to injunction bills? It is clear from the third order, that there was something which the defendant was bound to do within eight days. It is said, however, that that part of the tenth order has received a different construction, and that it was because amended bills were not included in it, that the third order of May was made. Now I am very sorry to have to contend with a decision of the Vice-Chancellor's, more particularly where it is one to which I am said to have assented: but it really seems to me, that but for \*that case, there would be very little difficulty in construing the [\*239] tenth order. That order begins by prescribing certain times within which a defendant is to plead, answer, or demur to original and supplemental bills and bills of revivor. Then comes another clause, referring, in terms, to amended bills, after which immediately follows the clause in question—"that in every cause for an injunction to stay proceedings at law, if the defendant do not plead, answer, or demur to the plaintiff's bill within eight days after appearance, the plaintiff shall be entitled, as of course, upon motion, to such injunction;" the words are, "in every cause for an injunction"—there seems an anxiety to be as general as possible: no good reason has been suggested why the word "bill" should not refer to amended bills, as well as to any others on which an injunction may be obtained: all the different kinds of bills are enumerated in the former part of the order, and the only reason for not repeating them is that the order is here speaking of bills for an injunction, a description which includes equally original, amended, and supplemental bills. Undoubtedly, this construction of the order is directly at variance with that put upon it by the Vice-Chancellor in *Lee v. Ravenscroft*. The present case, however, obliges me to express my opinion upon that decision, and, however it may have been acted upon since it was pronounced, to say that, in that part of the tenth order which relates to injunction bills, amended bills are included. That construction makes the order consistent with the previously established practice, whereas the other would produce great confusion. The order of the Vice-Chancellor, therefore, in this case must be discharged; but as it is impossible to say, after the decision in *Lee v. Ravenscroft*, that Mr. Wakefield's client was wrong in applying, I shall make no order as to the costs.

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 1841.—Saunders v. Vautier.
 

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[\*240]

\*SAUNDERS v. VAUTIER.

1841: June 2, 4, 5.

A testator, by his will, bequeathed to his executors and trustees all the East India stock which should be standing in his name at his death, upon trust to accumulate the dividends until D. W. V., should attain twenty-five, and then to transfer the principal, together with such accumulations, to D. W. V., his executors, administrators, or assigns, absolutely. The will contained also a residuary bequest. The testator had 2000*l.* East India stock standing in his name at his death. Held, that D. W. V. took an immediate vested interest in that legacy, although he was a minor at the testator's death; and, accordingly, the court ordered the stock, with its accumulations, to be transferred to him on his attaining twenty-one.

*Semble*: The existence of an order for the maintenance of an infant out of the income of a fund, does not prevent the court, in a subsequent proceeding in which the title to the principal comes directly in question, from making an order negating the infant's title to the fund.

RICHARD WRIGHT, by his will, gave and bequeathed to his executors and trustees thereafter named, all the East India stock which should be standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue due thereon until Daniel Wright Vautier, the eldest son of his (the testator's) nephew, Daniel Vautier, should, attain his age of twenty-five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, or assigns absolutely; and the testator gave, devised, and bequeathed all his real estates, and all the residue of his personal estate whatsoever and where-soever, to his executors and trustees thereafter named, their heirs, executors, administrators, and assigns, upon trust to sell and convert into money all his said real and personal estates immediately after his decease, and to invest the produce arising therefrom in their names in the 3*l.* per cent consolidated bank annuities, and to stand possessed thereof upon trust for the said Daniel Vautier and Susannah his wife, and the survivor of them, during their respective lives, and from and after the decease of the survivor of

[\*241] them, \*upon trust for their children, equally, when and as they should, severally, being sons, attain the age of twenty-one years, or being daughters, attain that age or be married, with the consent of their trustees and guardians, and in the meantime to apply the interest and dividends, of the respective shares of such children for their benefit, education, or maintenance; and in case any child should die before attaining a vested interest in the fund, then the testator directed that the share of the child so dying should go and survive to the others: and the testator nominated and appointed his friends John Saunders and Thomas Saunders his executors and trustees.

The testator died on the 21st of March, 1832, at which time a sum of 2000*l.* East India stock was standing in his name. The executors, having proved the will, left that sum standing in the testator's name, but invested

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1841.—Saunders v. Vautier.

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the dividends on it, as they accrued, in the purchase of like stock in their own names.

Shortly after the testator's death, this suit was instituted by the executors against Susannah Vautier and her children (Daniel Vautier having died in the testator's lifetime,) for the purpose of having the trusts of the will carried into execution under the direction of the court; and a decree was accordingly made, directing the usual accounts. A petition was afterwards presented on behalf of Daniel Wright Vautier, who was then a minor, praying the appointment of a guardian, and an allowance for his past and future maintenance: and, the usual reference having been directed, the master, by his report, found, amongst other things, that the petitioner's fortune consisted of the sum of 2277*l.* 6*s.* 7*d.* East India stock, being the amount of the above-mentioned sum of 2000*l.*, with the accumulations thereon since the testator's death, and \*of one-seventh share of the testator's residuary [\*242] estate, which would be divisible on the death of the petitioner's mother. He also found that the petitioner had been educated and maintained, since the death of the testator, by his mother, and that she had properly expended in such maintenance the sum of 338*l.* 2*s.*, which he found ought to be paid to her by sale of a sufficient part of the 2277*l.* 6*s.* 7*d.* East India stock; and he found that the sum of 100*l.* per annum would be a proper sum to be allowed for the maintenance and education of the petitioner for the time to come during his minority, and that it should be paid out of the dividends of the East India stock.

By an order of the Master of the Rolls, (Sir C. C. Pepys,) dated the 25th of July, 1835, that report was confirmed and carried into effect, and, in pursuance of that order, the trustees continued, during the minority of Daniel Wright Vautier, to pay the sum of 100*l.*, out of the dividends of the stock, for his maintenance.

Daniel Wright Vautier attained twenty-one in the month of March, 1841, and being then about to be married, he presented a petition to the Master of the Rolls,[1] praying that the trustees might be ordered to transfer to him the East India stock, or that it might be referred to the master to inquire whether it would be fit and proper that any and what part of the stock should be sold, and the produce thereof paid to the petitioner, regard being had to his intended marriage, and for the purpose of establishing him in business.

Upon that petition coming on to be heard before the Master of the Rolls, his lordship's attention was called \*to the order of the 25th [\*243] of July, 1835, whereupon he declined to deal with the question raised upon the petition, so long as that order remained; and it was, in consequence, arranged that the petition should stand over, for the purpose of ena-

[1] Lord Langdale, the successor of Sir C. C. Pepys, who became chancellor with the title of Lord Cottenham. The case before Lord Langdale, Master of the Rolls is reported 4 Beav. 115.

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1841.—*Saunders v. Vautier*.

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bling the other residuary legatees to present an appeal petition from that order to the Lord Chancellor.

An appeal petition was accordingly presented, praying, simply, that the order of the 25th of July, 1835, might be discharged or varied; and that petition now came on to be heard.

Mr. *Richards* and Mr. *Dean*, for the residuary legatees, contended that the order for maintenance out of this fund was erroneous, inasmuch as the legatee took no interest in it until he attained the age of twenty-five years: for, there being no gift but in the direction for payment on the legatee's attaining that age, it followed, according to the established rule, that the vesting of the legacy was postponed until that period, unless, from particular circumstances, a contrary intention could be collected. In this case, however, there were none of the *indicia* from which such an intention had usually been inferred. There was no direction in the will to give the legatee the interim enjoyment of the produce of the fund, nor even so much as a provision for maintenance out of it; and it had been held, that even the existence of such a provision afforded no presumption of an intention to vest the capital; *Leake v. Robinson*.(a) The accumulations were not, as in *Hanson v. Gra-*

*ham*,(b) directed to be made for the benefit of the legatee; nor was [\*244] there any gift of them, "any more than of the principal, except in the direction for payment. The gift was, in fact, precisely equivalent to a bequest of a sum of money, with interest, on the legatee's attaining a particular age, which had been held not to give a vested interest in the meantime; *Knight v. Knight*.(c) The only circumstance in the present case which indicated an intention to vest the legacy, was the direction to pay to the legatee, "his executors, administrators, or assigns;" but these words could not be relied on, as they were merely the technical form of expressing an absolute interest.

They also cited *Battsford v. Kebbell*,(d) *Vawdry v. Geddes*,(e) *Judd v. Judd*,(g) *Newman v. Newman*,(h) and they observed, that the course adopted by the Master of the Rolls showed that his lordship considered that the order for maintenance was erroneous, or otherwise he would not have hesitated to order a transfer of the fund at once to the legatee.

THE LORD CHANCELLOR:—I cannot recognize the principle that the existence of an erroneous order as to maintenance prevents the court from making an order inconsistent with it, as to the principal fund. There was nothing to prevent the Master of the Rolls from disposing of the petition which was brought before him, notwithstanding that order. But, with respect to this petition, I do not see to what purpose I can deal with it. If the party were still a minor, and the payment of the maintenance under the order [\*245] were going on, there might be a reason for \*applying to stop it for the

(a) 2 Mer 363, see p. 387.

(b) 6 Ves. 239.

(c) 2 S. &amp; S. 490.

(d) 3 Ves. 363.

(e) 1 Russ. &amp; Mylne, 203.

(g) 3 Sim. 525.

(h) 10 Sim. 51.

1841.—Saunders v. Vautier.

future; but by discharging that order, I should be making the trustees liable for the payments they have made for maintenance. The petition presented to the Master of the Rolls is not now before me, or, with the consent of the parties, I would dispose of it.

It was then arranged that a similar petition should be presented, without delay, to his lordship, and that the argument should, in the meantime, proceed, as if such petition were actually before the court.

Mr. *Wigram* and Mr. *Wood*, for Daniel Wright Vautier:—Admitted the general principle, that where there was no gift but in the direction for payment at a certain time, the legacy was, in the meantime, contingent, unless a contrary intention appeared: but they insisted that the circumstance from which the court was in the habit of inferring such intention, was not the direction that the legatee should have the interim enjoyment of the fund, but the necessity of separating the principal sum from the bulk of the estate, in order to carry into effect the provisions of the bequest. Wherever such necessity occurred, it was immaterial whether the occasion of it was an immediate gift of the produce of the fund to the legatee, or a gift of the fund to a trustee to improve for his benefit. In either case, it was the separation of the fund that destroyed the contingent nature of the bequest, and raised a presumption that an immediate and absolute gift was intended, unless that presumption were rebutted by a gift over in the event of the legatee dying under the prescribed age; *Vawdry v. Geddes*.<sup>(a)</sup> That principle was recognized in *Boddy v. Dawes*,<sup>(b)</sup> and it would be \*found [\*246] to be the principle of all those cases in which a gift of this kind had been held to confer a vested interest; *Hanson v. Graham*,<sup>(c)</sup> *Branstrom v. Wilkinson*,<sup>(d)</sup> *Love v. L'Estrange*,<sup>(e)</sup> *Lane v. Goudge*.<sup>(g)</sup> The reasoning in *Batsford v. Kebbell* was not very intelligible; but, at all events, the ground of that decision, whether right or wrong, was peculiar to itself, viz. that the dividends of stock and the stock itself were distinct subject matters of bequest; and if that were so, the gift of the dividends, until the party attained the age at which he was to receive the stock, did not involve an immediate separation of the stock from the bulk of the estate.<sup>[2]</sup> They also cited *Boraston's case*,<sup>(h)</sup> *Manfield v. Dugard*,<sup>(i)</sup> *Doe v. Whitby*,<sup>(k)</sup> and relied on the limitation to “executors, administrators, or assigns,” observing that the legatee could have no “assigns” in the sense which that word was

(a) 1 Russ. & Mylne, 203.

(b) 1 Keen. 362.

(c) 6 Ves. 239.

(d) 7 Ves. 421.

(e) 5 Bro. C. P. 59.

(g) 9 Ves. 225.

(h) 3 Rep. 19.

(i) 1 Eq. Cas. Abr. 195, pl. 4.

(k) 1 Burr. 228.

[2] “A legacy to be severed from a general estate *instantly*, for the use and benefit of a legatee, is a very different thing from a legacy to be severed from the estate only upon the happening of a particular event. This distinction was urged by myself before Lord Cottenham, in the case of *Saunders v. Vautier*, and was approved by his judgment in that case.” *Wigram, V. C. Lister v. Bradley*, 1 Haro, 14.

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 1841.—Saunders v. Vautier.
 

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evidently intended to bear, unless the legacy vested before the time appointed for payment arrived.

Mr. *Anderdon* appeared for the trustees.

Mr. *Richards*, in reply, said that in all the cases which had been cited there was either an immediate gift of the interim produce of the fund to the legatee, or a trust to apply it for his benefit; and the mere separation of the fund from the rest of the estate had never been treated as alone sufficient to give the legatee a present vested interest. Still less could it be so considered in this case, in which the trustees of the legacy were also executors and trustees of the will generally.

[\*247] \*On the conclusion of the argument,

THE LORD CHANCELLOR said, that from what had been stated he must assume that the Master of the Rolls' impression was that the order for maintenance was erroneous.

Mr. *Wigram* said he understood that the Master of the Rolls, considering himself bound in point of form by that order, had expressed no opinion upon the merits.

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June 4.—THE LORD CHANCELLOR:—I should not have thought this a case of any difficulty; but the form in which it came before me, namely, a rehearing of an order made by me at the Rolls, though not, as I at first understood, at the suggestion of the Master of the Rolls, has called upon me to give it my most careful attention. I have no recollection of the case, and have no means of knowing how far my judgment was exercised upon the construction of the will. I cannot, however, assume that the order was made without my having considered the state of the property as stated in the master's report; as that would have been contrary to the course which I have always thought it my duty to adopt in such cases.

It is argued that the testator's great nephew, Daniel Wright Vautier, does not take a vested interest in the East India stock before his age of twenty-five, because there is no gift but in the direction to transfer the stock to him at that age. But is that so? There is an immediate gift of the East India stock; it is to be separated from the estate and vested in trustees; [\*248] and the \*question is whether the great nephew is not the *cestui que trust* of that stock. It is immaterial that these trustees are also executors; they hold the East India stock as trustees, and that trust is, to accumulate the income till the great nephew attains twenty-five, and then to transfer and pay the stock and accumulated interest to him, his executors, administrators, or assigns. There is no gift over; and the East India stock either belongs to the great nephew, or will fall into the residue in the event of his dying under twenty-five. I am clearly of opinion that he is entitled to it. If the gift were within the rule, there would be circumstances to take it out of its operation. There is not only the gift of the intermediate interest,



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 1841.—Saunders v. Vautier.
 

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indicative, as Sir J. Leach observes in *Vawdry v. Geddes*,<sup>(a)</sup> of an intention to make an immediate gift, because, for the purpose of the interest, there must be an immediate separation of the legacy from the bulk of the estate; but a positive direction to separate the legacy from the estate, and to hold it upon trust for the legatee when he shall attain twenty-five. The decision in *Vawdry v. Geddes* and other cases, in which there were gifts over, cannot affect the present question. *Booth v. Booth*,<sup>(b)</sup> is certainly a strong case, and goes far beyond the present, and so does *Love v. L'Estrange*;<sup>(c)</sup> and it is a decision of the House of Lords. That case has many points of resemblance to the present; and although Lord Rosslyn seems in *Monkhouse v. Holme*,<sup>(d)</sup> to question the principle of that decision, Sir W. Grant, in *Hanson v. Graham*,<sup>(e)</sup> justifies it upon grounds, most of which apply to this case, particularly that the fund was given to trustees till the legatee should attain a certain age, and that it should then be transferred to him; from which and other circumstances he thought it was "to be inferred, that the fund [\*249] was intended wholly for the benefit of the legatee, although the testator intended that the enjoyment of it should be postponed till his age of twenty-four. Such, I think, was clearly the intention of the gift in this case.

It was observed that the transfer is to be made to the great nephew, his executors, administrators, or assigns. It is true that the addition of those words does not prevent the lapse of a legacy by the death of the legatee in the lifetime of the testator,[3] but they are not to be overlooked, when the question is, whether the legacy became vested before the age specified; because if it were necessary that the legatee should live till that age to be entitled to the legacy, then there would be no question about his representatives at that time.

I am therefore of opinion that the order of 1835 was right, and that the petition of rehearing must be dismissed, and with costs; which I should not have ordered, if the Master of the Rolls had recommended the parties to adopt that proceeding upon a view of the merits of the case, but which I am now informed was not the case. The order for a transfer of the funds, upon the regular evidence of the legatee having attained twenty-one, will follow this decision upon the construction of the will.[4]

(a) 1 Russ. & Mylne, 203. See p. 208.

(b) 4 Ves. 399.

(c) 5 Bro. P. C. 59.

(d) 1 Bro. C. C. 298.

(e) 6 Ves. 239. See p. 248.

[3] *Shuttleworth v. Graves*, 4 Myln. & Cr. 38, 39. A gift to one for life, remainder to his children, gives a vested interest. Sugden, Ch.; *Kimberly v. Tew*, 2 Conn. & Law, 373.

[4] "It has frequently happened in this court, that a testator has given to an individual an absolute vested interest in a defined fund, so that, according to the ordinary rule of law, he would have a power, of his own authority, to receive or dispose of it immediately on his attaining legal age; but having given such a vested interest, the testator has nevertheless postponed the time of giving him possession, till a period subsequent to the legatee's attaining twenty-one, although in such cases the party having attained the age of twenty-one cannot, according to the direct intention of the will, obtain possession, yet he has everything but possession; he has the legal power of disposing of it; he may sell, charge or assign it, for he has an absolute, indefeasible interest in

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 1841.—*Saunders v. Vautier*.
 

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On the following day, a petition having, in the meantime, been presented, *pro forma*, to the Lord Chancellor, in pursuance of the arrangement above mentioned, the matter was again spoken to, when

Mr. *Anderdon* asked for the costs of the trustees, both of that petition and of the similar petition which had been presented to the Master of the Rolls, submitting that although that petition was not before his lordship, yet that the petition might be put upon the terms of paying the costs of it, as the condition of his obtaining the order which he asked.

a thing defined and certain; the court therefore has thought fit, (I don't know whether satisfactorily or not,) to say, that since the legatee has such the legal right and power over the property, and can deal with it as he pleases, it will not subject him to the disadvantage of raising money by selling or charging his interest when the thing is his own at this very moment. The court has, in such cases, ordered payment on his attaining twenty-one." Lord Langdale, *M. R. Curtis v. Lukin*, 5 Beav. 155. So, previously, in *Saunders v. Vautier*, 4 Beav. 115, Lord Langdale said: "Where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge." A testator directed the residue of his property to be invested in land, and given to S. who was "not to be of age to receive this until he attained his twenty-fifth year, and to be entitled to him and his heirs male;" it was held, that S. took a vested estate tail in the land; and that the rents and profits were applicable to his benefit during his minority. *Snow v. Poulden*, 1 Keen, 186. As to the vesting of a legacy, with deferred time of payment, see further, *Bland v. Williams*, 3 Myl. & K. 411; *Lister v. Bradley*, 1 Hare, 10; *Salisbury v. Petty*, 3 Hare, 90; 2 Sim. & Stu. 493, n. 1; 1 Russ. & M. 208, n. 3; 2 Beav. 226, n. 1, where a number of cases on the subject are collected; 10 Sim. 58, n. 1. That the direction for accumulation does not vary the general rule, see in addition to the case in the text, *Blease v. Burgh*, 2 Beav. 221; and the principle applies, as well to a residuary as a specific legacy. *Leeming v. Sherratt*, 2 Hare, 14. In that case Wigram, V. C. said, (p. 20,) "In *Saunders v. Vautier* the testator gave to his executors and trustees (the same individuals) all the East India stock which should be standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue thereon, until Daniel Wright Vautier should attain the age of twenty-five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, or assigns absolutely. Under this bequest the court gave Daniel Wright Vautier maintenance out of the fund during his minority, and, upon his attaining twenty-one, ordered the whole fund to be transferred to him. It is true that in that case, the Lord Chancellor noticed special circumstances which he thought sufficient to decide the question; but he expressed a clear opinion upon the case, independently of those circumstances; and the special circumstances he relied upon with respect to the particular legacy, in that case, apply by law, to a residuary clause, without being expressly mentioned." The case of *Parkham v. Gregory*, 4 Hare, 396, before the same judge, was also the case of a residuary gift. The Vice-Chancellor said: "If there is a gift to a person at twenty-one, or on the happening of any event, as occurred in the case of *Leake v. Robinson*, (2 Meriv. 363,) where there was a gift to persons upon their attaining twenty-five, or a direction to pay and divide when a person attains twenty-one, there, the gift being to persons answering a particular description, if a party cannot bring himself within it, he is not entitled to take the benefit of the gift. There is no gift in those cases, except in the direction to pay, or in the direction to pay and divide. But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or as the court has commonly expressed it, for the benefit of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed. In *Salisbury v. Petty*, 3 Hare, 86, I had a somewhat similar case before me."

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 1841.—Herring v. Clobery.
 

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THE LORD CHANCELLOR said, that he had no jurisdiction on the petition presented at the Rolls; but suggested to the petitioner that he should consent to those costs being included in the present order, as he would otherwise have to pay the expense of another application to the Master of the Rolls for the purpose of recovering them; which suggestion was acceded to.

Mr. *Richards* then made a similar application for the costs of the residuary legatees, which was opposed by Mr. *Wigram*, on the ground that the residuary legatees stood in the situation of parties who had opposed a claim and failed; but

THE LORD CHANCELLOR said, that as the fund had not been carried over to the separate account of the petitioner, and therefore could not have been obtained without serving the other parties in the cause, the residuary legatees were entitled to their costs; and, accordingly, his lordship directed that the costs of all parties to that petition, and also, by consent, of the petition at Rolls, should be paid out of the fund.[5]

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 \*HERRING v. CLOBERY.[1]

[\*251]

1841: April 28.

A motion for leave to prove *viva voce*, upon a rehearing, exhibits which were not in evidence upon the original hearing, does not require notice.

AN appeal from the whole decree in this cause being in the Lord Chancellor's paper of appeals, Mr. *Glasse* asked leave to give a notice of motion for liberty to prove, *viva voce*, at the hearing of the appeal, exhibits which were not in evidence upon the original hearing, stating that if such leave were not given, the appeal would probably come on to be heard before the motion could be made. He mentioned the case of *Higgins v. Mills*,(a) as showing that notice was necessary.

THE LORD CHANCELLOR:—On a rehearing, you may use any evidence you might have used below, not requiring new depositions; and therefore the motion does not require notice.[2]

(a) 5 Russ. 287, and see *Lovell v. Hicks*, 2 Y. & Coll. 472.

[5] *Skuttleworth v. Howarth*, ante, 228.

[1] S. C. in a subsequent stage, 1 Phillips, 91.

[2] A deed charged in the bill, and admitted in the answer, may be read at the hearing without having been made an exhibit, and without a previous notice or rule to produce and prove it at the hearing. *Dey v. Dunham*, 2 Johns. Ch. Rep. 188.

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 1841.—Royle v. Wynne.
 

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[\*252]

\*ROYLE v. WYNNE.

1841 : July 12, 13.

Where a party claiming to be entitled to real estate, but being uncertain whether his title was a legal or an equitable one, was proceeding for the recovery of it by action at law and bill in equity at the same time: Held that he was bound to elect either to suspend his proceedings at law or to have his bill dismissed, although the relief prayed by the bill, embracing an account of rents, and a delivery of the title deeds, was more extensive than that which was sought by the action.

Where a party is proceeding at law and in equity at the same time for the same cause of suit, the court has no discretion to retain the suit if the plaintiff proceed with his action, except in cases where the proceeding at law is ancillary to that in equity, in which cases the court has the power to mould the proceedings with a view to its own decree, and for that purpose may allow the action to proceed, retaining the bill in the mean time.

JOHN ROYLE, by his will, dated the 17th of September, 1839, gave and devised to his nephew Hugh Wynne Royle and his heirs, four farms in the county of Carnarvon, which he particularly described, and after several other devises and bequests, he gave and bequeathed all the residue of his real and personal estate to his nephew, John Wynne, his executors, administrators, and assigns, upon trust to sell and dispose of all his goods and furniture, and call in and collect all such debts or sums of money as should be due and owing to him; and out of the moneys to arise from such sale and collection, to pay and discharge funeral and testamentary expenses, and the legacies previously given, and after payment thereof, and all necessary costs, charges, and expenses attending the same, to divide the remainder of the said moneys equally, share and share alike, between himself (John Wynne,) and three nieces of the testator, who were particularly named.

Hugh Wynne Royle died in the lifetime of the testator, and the testator died in the month of March, 1840, leaving the plaintiff his heir at law. John Wynne having, upon the death of the testator, entered upon the four farms devised to Hugh Wynne Royle, and possessed himself of the title

deeds, the plaintiff filed this bill against John Wynne and the testator's three nieces, \*praying that it might be declared that the equitable interest in the four farms devised to Hugh Wynne Royle resulted to him as heir at law of the testator, and that the defendant John Wynne might be decreed to convey the legal estate in those premises, and to deliver up the title deeds to the plaintiff, and to account to him for the rents and profits which had accrued since the death of the testator, and that in the mean time, if necessary, a receiver might be appointed.

Shortly after the institution of this suit, the plaintiff being advised that the estates in question did not pass under the residuary devise, brought an action of ejectment against the tenant in possession of one of the farms only; whereupon the defendant John Wynne, having put in his answer, made a special motion, before the Vice-Chancellor, that the plaintiff might be ordered to elect, within eight days after the order to be made on the motion, whether he would proceed in the suit or in the action of ejectment; and if he

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 1841.—Royle v. Wynne.
 

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should elect to proceed in equity, then that the proceedings at law might be stayed by injunction, but if he should elect to proceed at law, or in default of such election by the time aforesaid, then that his bill might from thenceforth stand dismissed, with costs to be taxed by the master; or if his honor should be of opinion that the bill should not, in that event, be absolutely dismissed, then that it might stand dismissed as to so much thereof as related to the premises which were the subject of the action.

The Vice-Chancellor having refused that motion, with costs, it was now renewed, by way of appeal, before the Lord Chancellor.

Mr. *Stuart* and Mr. *Walker*, in support of the motion.—

"The necessity for a special motion in this case arises from the [\*254] plaintiff's having thought fit to embrace in his suit other estates besides those which are the subject of his action. If it had not been for that circumstance, the order which is now asked would have been a matter of course: *Hogue v. Curtis*.<sup>(a)</sup> The Vice-Chancellor refused the motion below, on the ground that, although the subject matter of the two proceedings was the same, the relief sought by them was different; inasmuch as the suit in equity went not merely to a recovery of the lands, but to an account of past rents, and the delivering up of the title deeds. Lord Bacon's rule,<sup>(b)</sup> however, only requires that the two proceedings should be for the same cause of suit; and it is immaterial what may be the nature or extent of the relief which they respectively seek to obtain: *Carrick v. Young*.<sup>(c)</sup> In that case the bill in equity was filed for a specific performance of an agreement to accept a lease, while the action was brought to recover compensation for the use and occupation of the farm which was the subject of the agreement; and yet the party was put to his election. It will, perhaps, be said that the present case is not within the rule, because the rights upon which the plaintiff proceeds in the two courts are different; the answer, however, is, that though a plaintiff may pray alternative relief in respect of one and the same title, he cannot be allowed to assert two contradictory titles, either in the same proceeding, *Edwards v. Edwards*,<sup>(d)</sup> or at the same time in two different proceedings: *Cockerell v. Cholmeley*.<sup>(e)</sup>

Mr. *Wigram* and Mr. *Campbell*, *contra*.—\*The rule as to elec- [\*255] tion is within the discretion of the court; and this is not a case in which it ought to be enforced. The ground of the decision in *Hogue v. Curtis* was that the two proceedings were merely concurrent and equivalent remedies for the same right, and therefore the prosecution of both together could answer no purpose but that of vexation. In the present case, the plaintiff is clearly entitled to the property in question, in one of two ways—either by direct inheritance, or by a resulting trust under the residuary clause in the will; that clause, however, is so worded as to make it extremely doubtful whether his title is a legal or an equitable one. *Doe v. Buckner*,<sup>(g)</sup> *Doe v.*

(a) 1 J. & W. 449.

(b) See Beames's Orders, p. 11.

(c) 4 Madd. 437.

(d) Jac. 335.

(e) 1 Russ. & Mylne, 418; see p. 423.

(g) 6 Term Rep. 610.



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 1841.—Royle v. Wynne.
 

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*Hurrell.*(a) If, with a view to enforce his rights with as little delay as possible, he chooses to proceed upon both titles concurrently, no one has reason to complain : because, if he succeeds upon one, he must necessarily fail upon the other, and will have to pay the costs of that proceeding in which he fails. If, therefore, he is willing to incur some additional expense in order to secure an earlier determination of his rights, why should the court interfere to prevent him ? To do so in a case like the present would be to convert a rule which was intended only to prevent vexation, into an impediment to the speedy administration of justice.

Mr. *Stuart*, in reply.

THE LORD CHANCELLOR :—Applications to restrain a party from proceeding in two different courts, at the same time, for the same cause of suit, are of two kinds. In cases of election, properly so called, the application is, that if the plaintiff elects to proceed at law his bill may be dismissed : [\*256] and the order upon that motion is not within the discretion of the court. But there is another class of cases which are not, properly speaking, cases of election, where the proceeding at law is ancillary to that in equity. There, the form of the application is different—that if the plaintiff shall elect to proceed at law, the suit may be stayed in the meantime—for, in those cases, the court has a discretionary power to mould the proceedings with a view to its own decree, and, for that purpose, may retain the bill until the action shall have been disposed of. That is the course frequently adopted on motions for an injunction, where it appears that there is a legal question to be tried before the court can make a decree. In such cases, it is the constant practice to direct that an action shall be brought, retaining the bill in the mean time. And, upon the same principle, if, in such a case the court found an action already commenced which would ascertain the legal right, it would allow such action to proceed without dismissing the bill. It struck me, at first, that the present might be a case of that kind ; but, upon further consideration, I am of opinion that it is one of election properly so called, and therefore, that if the plaintiff proceeds at law, so much of the bill, as relates to the estate which is the subject of the action, must be dismissed.[1]

July 13.—On the following day, Mr. *Wigram* stated that his client had elected to abandon his action, and to proceed in equity. Whereupon Mr. *Stuart* asked for the costs of the motion before the Vice-Chancellor ; but

THE LORD CHANCELLOR said, that as he should not have given either party the costs of the motion, if he had heard it himself originally, but should have directed them to be costs in the cause, and as he always

(a) 5 B. & Ald. 18.

[1] A vendor conveyed certain property to a purchaser, and took a bond for the purchase money. He afterwards sued at law on the bond, and filed a bill in equity to enforce his equitable lien. He was put to his election in which court he would proceed. *Barker v. Smark*, 3 Beav. 64, and see 1 Russ. & M. 423, n. 1.



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 1841.—Marten v. Whichelo.
 

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\*put the parties, on an appeal motion, in the situation in which they [\*257] ought to have been placed if the right order had been made in the first instance, he should direct that the costs of the motion before the Vice-Chancellor should be costs in the cause.

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### MARTEN v. WHICHLO.

1841: January 29; August 1.

The plaintiff in a creditor's suit having taken the bill *pro confesso* against one of the defendants, who was the executor, adduced no evidence of his debt as against the other defendants, who were the devisees of the testator's real estate, and who did not admit the debt, except an examined copy of the judgment which the plaintiff had recovered for it at law against the executor. The court, under the circumstances, refused leave to supply the defect in the evidence at the hearing, and dismissed the bill, as against the devisees, with costs.

THE bill in this cause was filed on the 19th of July, 1836, by Jane Marten, on behalf of herself and the other unsatisfied creditors of the testator, against Richard Lemmon Whichelo, the sole acting executor, and two other persons, to one of whom the testator had by his will devised certain freehold, and to the other certain leasehold as well as freehold estates. The bill stated, amongst other things, that the plaintiff was the holder of a promissory note made by the testator on the 17th of July, 1826, for the sum of 746*l.* 11*s.* 4*d.*, payable at three months after sight, with lawful interest; that the note had been presented to the testator for payment on the 30th of December, 1829, but that he died in the month of December, of the following year, without having paid any part of it; that, upon his death, Whichelo having proved the will, possessed himself of the testator's personal estate to an amount more than sufficient for the payment of the promissory note in question, and of all his other debts, but that he had wasted and misapplied the assets: that in the year 1833, the plaintiff recovered a judgment against Whichelo \*in an action upon the promissory note, and sued out a writ of [\*258] *fiери facias* against the personal property of the testator in the hands of Whichelo, but that she had been unable to levy more than 72*l.* 16*s.* 2*d.* under the execution. The bill also charged that, in that action, Whichelo had not pleaded *plene administravit*, but had, by the form of his pleading, admitted assets; and it prayed, in effect, that the usual accounts might be taken of the testator's estate, and that if a sufficient sum should not be forthcoming from Whichelo to pay what was due to the plaintiff and the other unsatisfied creditors, the leaseholds first, and if necessary (by marshalling the assets) the freehold estates also, which were devised to the other two defendants, might be made available for the deficiency, in a due course of administration.

The defendants, the devisees, neither admitted nor denied the plaintiff's

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1841.—*Marten v. Whichelo.*


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debt, but insisted that by not having used due diligence to recover it from the executor, she had forfeited her right to resort to the real estates specifically devised. One of the devisees also insisted upon the statute of limitations. Against Whichelo the bill was taken *pro confesso*; after which the suit, having become abated by the marriage of the plaintiff, was revived, in the usual manner, against all the defendants, including Whichelo.

The only evidence taken in the cause was an examined copy, which was proved on the part of the plaintiff, of the judgment recovered by her against Whichelo.

The cause came on to be heard before the Lord Chancellor.

[\*259] \*Mr. *Turner* and Mr. *Blunt* appeared for the plaintiff.

Mr. *Wakefield* and Mr. *Rogers*, for the devisee, who had insisted upon the statute of limitations.

Mr. *Bethell* and Mr. *Teed*, for the other devisee.

Upon the opening of the case, the counsel for the devisees objected, that the making Whichelo a party to the bill of revivor was, in effect, calling upon him to proceed in the suit, and was consequently a waiver of the previous process for taking the bill *pro confesso* against him; and therefore, that as he did not appear, the suit was defective as to parties; but

THE LORD CHANCELLOR overruled the objection, saying, that the only way by which the plaintiffs in the revived suit could have the benefit of the order to take the bill *pro confesso*, was by making Whichelo a party to the bill of revivor; if he had not been made a party to it, there might have been ground for the objection.

It was then objected that there was no evidence of the debt but the judgment recovered against the executor, which could not affect the devisees, who were no parties to the action.

In answer to that objection, it was submitted, on the part of the plaintiff, that the judgment obtained against the executor was sufficient foundation for an inquiry as to the debt, with a view to charge the other defendants; and that, at all events, as the defect in the evidence was evidently a mere slip on the part of counsel, the court would allow the cause to stand over,

with liberty to the plaintiffs to exhibit an interrogatory to prove the  
[\*260] debt. Upon that point, the cases collected in *Seton on Decrees*, \*p. 363, *Hood v. Pimm*,(a) and *Lord Redesdale Plead.*, p. 329, 4th ed., were cited.

Another point taken was, that although it appeared, upon the plaintiff's own showing, that the debt became due more than six years before the filing of the bill, the plaintiff did not allege an acknowledgment of it by either of the devisees within that time; so that, even as against that devisee who had not insisted upon the statute of limitations, the bill stated no case upon which a decree could be made.

On the other hand, it was contended, that the judgment recovered against

(a) 4 Sim. 101.

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 1841.—Marten v. Whichelo.
 

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the executor was sufficient to keep the plaintiff's claim alive, at least as against that devisee who had not insisted upon the statute. Upon that point, *Putnam v. Bates*,<sup>(a)</sup> and *Braithwaite v. Britain*,<sup>(b)</sup> were cited.

Upon the conclusion of the argument,

THE LORD CHANCELLOR said, he would look into the cases before he gave his decision; but that his impression was, that the court would not, at the hearing, allow a plaintiff to prove that upon which his whole case depended.

Aug. 1.—THE LORD CHANCELLOR :—The creditor, the plaintiff in the cause, claiming a debt upon a promissory note of the 17th of July, 1826, filed her bill on the 19th of July, 1836, against Whichelo, the personal representative of the debtor, and the other "defendants, devisees of his real estate, stating that, in 1833, she brought an action and obtained judgment against Whichelo for the principal and interest due upon the note; but that she had only been able to levy 72*l.* 16*s.* 2*d.* out of the debtor's assets, although Whichelo had received personal estate more than sufficient to pay this and all the other debts, and in proof of this, charged that Whichelo in the action did not plead *plene administravit*. Upon this statement the plaintiff was entitled to execution against Whichelo personally, and, according to her own statement, she is suing the devisees of the real estate upon a simple contract debt, more than six years after it accrued, although the personal representative received ample assets, and after a judgment against him *de bonis testatoris, et, si non, de bonis propriis*. The bill was taken *pro confesso* against Whichelo, the personal representative; and, as against the devisees, there was no proof of the debt, the only evidence being an examined copy of the judgment against Whichelo. There could not, therefore, be any decree against the devisees; but it was asked, that the plaintiff might have permission to go into evidence to prove the debt, and the cause stood over that I might examine the cases upon that point. The cases upon this subject are collected in Mr. Seton's book on Decrees, p. 363, and by Mr. Daniell, 2 vol. 416. It is impossible to reconcile the cases, or to extract any principle upon which any fixed rule can be founded. The court has exercised a wide discretion in giving or refusing leave to supply the defect of evidence, in doing which, the merits of the case upon the plaintiff's own showing ought to have a leading influence. I think, in this case, I should not exercise a sound discretion in giving to the plaintiff an opportunity of going into new evidence against these devisees. The bill, therefore, must be dismissed, with costs, against them.[1]

(a) 3 Russ. 183.

(b) 1 Keen, 206.

[1] "When evidence to a certain extent has been given in support of the case of a complainant or informant in equity, but which is not, in the view of the court, sufficient at the hearing, and the court sees that there is moral certainty, or reasonable probability that evidence can be added, it is within the discretion of the court, regard being had to the circumstances of the particular case, to

1841.—Collins v. Collyer.

[\*262]

\*COLLINS v. COLLYER.

1841: April 22.

It appearing upon a motion to take the bill *pro confesso* against a defendant who was in custody under an attachment for want of an answer, that the time for making it had expired; the court not only refused the motion, but forthwith discharged the prisoner out of custody without paying any of the costs of his contempt.

A DEFENDANT in this cause was arrested under an attachment for want of an answer, on the 2d of June, 1840, and on the 2d of November following, he was brought up to the bar of the court, and turned over to the Fleet. On the 8th of March following, the plaintiff moved, before the Master of the Rolls, that the bill might be taken *pro confesso* against him; when his lordship made an order that the cause should be set down to be heard, and that the plaintiff's clerk in court should then appear with the record, in order that the bill might be taken *pro confesso* against the defendant, and that the defendant should be remanded to prison until he should put in his answer and clear the costs of his contempt.[1]

The plaintiff being dissatisfied with that order, Mr. *Torriano* now moved

determine whether an opportunity should be afforded to the parties of adducing further evidence." Knight Bruce, V. C. *Attorney General v. Severne*, 1 Coll. C. C. 317. In a creditor's suit seeking to charge the real and personal estate of a testator, the plaintiff's debt was admitted by the executors and trustees, and by such of the parties beneficially entitled as were *sui juris*; but one defendant was a married woman, and another an infant, and there was no evidence of the debt except the admission. Two of the defendants were alleged, and in like manner admitted, to be out of the jurisdiction, but the fact was not proved. On the hearing liberty was given the plaintiff to exhibit interrogatories to supply these defects. Wigram, V. C. "The debt is admitted by the widow of the testator, and the other devisees who are *sui juris*, but there is nothing which can be taken as proof against the married woman and the infant. The plaintiff's case is therefore defective; and the question is, whether I am simply to dismiss the bill as against those parties, or give the plaintiff the indulgence of proving his debt in this suit. I was referred to *Marten v. Whickelo* as an authority that I ought to adopt the former alternative; but, in that case, there was no proof against any party that the debt was due; and Lord Cottenham said his impression was, that where the plaintiff gave no evidence on the point upon which his whole case depended, he would not, at the hearing, be allowed to prove it, and after reference to the authorities he said, that the court had exercised a wide discretion in giving or refusing leave to supply the defect of evidence, in doing which the merits of the case, upon the plaintiff's own showing, ought to have a leading influence. In some cases, the court has granted the indulgence. In the present case, I think I am justified in giving the plaintiff leave to perfect his case by proving the debt, inasmuch as that debt is admitted by all the parties who are before the court, and are *sui juris*.—The plaintiff alleges that two of the parties are out of the jurisdiction; but there is no evidence of that fact, which ought to be proved in the regular manner. But as the plaintiff in this case must prove his debt, the obviously convenient course is to give him also, under the decree, the opportunity of proving that the parties are out of the jurisdiction." *Hughes v. Eades*, 1 Hare, 486. Where evidence is documentary, and there has been some defect in the proof of it, it is usual to allow the cause to stand over, in order to supply the deficiency. *Cogswell v. Burtis*, 1 Hoff. Ch. Rep. 198. But "generally speaking," says Lord Cottenham, "a plaintiff who brings his cause to a hearing is expected to bring it on in such a state as will enable the court to adjudicate upon it, &c." *Bacon v. Jones*, 4 Myl. & Cr. 437.

[1] The case before the Master of the Rolls is reported, 3 Beav. 600.

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 1841.—Lewis v. Evans.
 

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on his behalf, before the Lord Chancellor, that it might be discharged, and that the bill might be taken *pro confesso* against the defendant; and that he might be remanded to prison until he should clear the costs of his contempt.

Mr. *Wakefield* appeared for the defendant, but declined to support the order of the Master of the Rolls, as being at variance with the practice of the court.

THE LORD CHANCELLOR said, that as it was admitted on all hands that the order of the Master of the Rolls was irregular, and as he was himself of that opinion, he must discharge it.

\*Mr. *Wakefield* then contended, that the plaintiff was too late to [\*263] ask for the rest of his motion: that the period within which the plaintiff might, by the provisions of the 1 W. 4, c. 36, s. 15, have obtained an order to take the bill *pro confesso*, being twenty-eight days from the time when the defendant was brought up, expired on the 30th of November, and that the six weeks beyond that time within which the plaintiff was, by the thirteenth rule of that statute, bound to obtain such order, expired on the 13th of January; whereas the present notice of motion was not given until the month of April.

Mr. *Torriano*, in reply.

THE LORD CHANCELLOR:—It is clearly too late now to move to take the bill *pro confesso*; and that being the case, I have no right to detain the prisoner any longer in custody. If, therefore, Mr. *Wakefield* applies, he must be discharged.

Mr. *Wakefield* then moved, in pursuance of the provisions of the thirteenth rule, that the prisoner be discharged without paying the costs of his contempt, which was ordered accordingly.(a)

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 \*LEWIS v. EVANS.

[\*264]

1841: June 12.

A defendant originally committed to prison under an attachment for not appearing to the bill, remained there without applying for his discharge, after he had by the default of the plaintiff become entitled to be discharged without paying any of the costs of his contempt. While he so remained in prison, the plaintiff lodged an attachment against him for want of an answer: Held, that, under these circumstances, the attachment could not operate as a valid detainer; and, therefore, upon the subsequent application of the prisoner, he was discharged, without paying any of the costs of his contempt.

THE defendant having been committed to jail under an attachment for not appearing to the bill, the plaintiff omitted to obtain an order for entering an

(a) It would seem that the Master of the Rolls' order was made after the defendant had become entitled to his discharge in consequence of the plaintiff's neglect to proceed to take the bill *pro confesso*, although that circumstance was not adverted to in the argument or in the judgment. [See the next case; *Haynes v. Ball*, 4 Beav. 101; *Woodward v. Conebeer*, 2 Hare, 506; S. C. 1 Hare, 297.]

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 1841.—Byde v. Masterman.
 

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appearance for him within the time allowed for so doing by the thirteenth rule of 1 W. 4, c. 36, s. 15. The defendant, nevertheless, remaining in custody without applying for his discharge, was brought up to the bar of the court before the Master of the Rolls, on the second day of the following term, which was within the time limited for that purpose by the fifth rule; and the Master of the Rolls then made an order for turning him over to the Fleet, and at the same time directed an appearance to be entered for him. The defendant having remained in the Fleet for some time longer, at length applied for his discharge under the thirteenth rule, when it appearing from the return made by the warden of the Fleet of the causes of his detainer, that an attachment for want of an answer had been lodged there against him since the order was made for entering an appearance for him, his lordship refused the motion, with costs.

Mr. *Cooper* now moved, before the Lord Chancellor, that that order of the Master of the Rolls might be discharged, and that the prisoner might be released from custody without paying any of the costs of his contempt.

[\*265]     \*In support of the motion, he cited *Hawkins v. Hall*(a) and *Hutchins v. Kenrick*.(b)

Mr. *Richards* appeared for the plaintiff, and opposed the motion.

THE LORD CHANCELLOR, said that the rule which prevailed both at law and in equity was, that when a party had once become entitled to his discharge from custody by the rules of the court, no advantage could be taken of his being improperly detained, for the purpose of serving any new process upon him; and, consequently, the attachment which had been lodged in this case could not operate as a valid detainer of the prisoner. His lordship accordingly made an order, discharging the order of the Master of the Rolls, and releasing the prisoner from custody, without payment of any of the costs of his contempt.[1]

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#### BYDE v. MASTERMAN.

1841: April 30; May 1.

Trustees of real estates having, in a schedule to their answer to a bill for an account of the trust estates, set forth the minute particulars of the different estates with undue prolixity and diffuseness, a general exception to the schedule, as being impertinently set forth, was allowed by the master, and an exception to his report was overruled by the court, although it appeared that there were a few passages in the schedule which were not liable to that objection.

THIS was an appeal from an order of the Master of the Rolls, allowing an exception to the master's report, by which he had certified that the whole of the first schedule to the answer of two of the defendants was impertinent.

(a) 4 Mylne & Craig, 280.

(b) 2 Burr. 1048.

[1] *Woodward v. Conebeer*, 1 Hare, 297; 1 Beav. 78, n. 1.



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1841.—Byde v. Masterman.

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\*The bill was filed for an account of the rents, profits, and proceeds [\*266] of sale of certain freehold and copyhold estates which had been conveyed and surrendered by a person since deceased, to three trustees, of whom the two defendants, whose answer was in question, were the survivors, upon certain trusts, which were declared, as to part of the estates, by an indenture of the 26th of October, 1826, and, as to the rest, by the will of the settlor, of subsequent date.

By the indenture, the estates therein comprised were directed to be sold immediately after the settlor's death, for the payment of his debts and certain charges and incumbrances. The estates of which the trusts were declared by the will were also charged, generally, with the payment of the testator's debts; but the ulterior limitations of both instruments were, so far as the plaintiff's interest was concerned, the same.

In the interrogating part of the bill, the defendants, the trustees, were required to set forth whether in the year, 1826, or at some other and what time, Thomas Hope Byde (the settlor) deceased, was not seised of or otherwise well entitled to divers, or some and what manors or lordships; and whether or not divers, or some and what freehold and copyhold messuages, farms, lands, and hereditaments; and whether or not for such estates therein respectively as were thereinbefore in that behalf mentioned, or for some and what other estate or estates; and whether the said Thomas Hope Byde was not at the respective times of making his will and of his death, or when else in particular, seised or well entitled of or to divers or some and what manors; and whether or not also of or to divers or some and what freehold, and whether or not also of or to divers or some and what copyhold estate or estates; and whether or not of great, \*or some and what value; and [\*267] whether or not for such interests therein respectively as thereinbefore in that behalf mentioned; or for some and what other interests or interest, or how otherwise.

In a subsequent passage of the bill there was also an inquiry, what parts of the trust estates had been sold.

The trustees, by their answer, referred to the first schedule thereto annexed, as containing all the information they could give upon the subject of these inquiries. In that schedule, the copy of which extended over twelve brief sheets, they set forth the particulars of the trust estates, distinguishing what parts were freehold and what copyhold; what parts were subject to the trusts of the indenture, and what parts to the trusts declared by the will; what portions of the former had been sold, and what remained unsold; but describing the particulars, comprehended under those different heads, for the most part, after the following manner:—

“Ware Park and Ware Park Farm, comprising the capital messuage or mansion house, situated, standing, and being in the parish of Ware, in the county of Hertford, called or known by the name of Ware Park, with the out-houses, buildings, yards, orchards, and garden thereunto belonging; and

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 1841.—Byde v. Masterman.
 

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the messuage, farm lands, tenements, and hereditaments hereinafter mentioned, containing together by estimation 440 A. 0 R. 16 P. be the same more or less, and which are called or known by the name of Ware Park and Farm, and containing the following particulars, viz. site of mansion house, garden, stables, &c. 5 A. 3 R. 29 P. The lawn 35 A. 0 R. 53 P.;" and so forth, the descriptions in many instances extending to the boundaries and abutments of the different closes, and to the names of the persons by [\*268] whom they had been successively occupied, after the manner of a description of parcels in a deed.

Other passages, however, of the schedule, contained a simple enumeration of the houses or cottages on parts of the estates, with the tenants' names and the rents at which they were respectively let.

There were also several detached passages, of considerable length, explanatory of certain peculiarities in the title to portions of the estates, arising from defective recoveries, exchanges, and other acts and dealings of the settlor during his lifetime; in consequence of which the defendants alleged that they were unable to state with certainty what estates the settlor had in such portions.

Six exceptions were taken by the plaintiff to this answer, the first five of which related to particular passages in the body of it; the sixth, which was alone the subject of this appeal, was in these words.

"For that the first schedule annexed to the said answer is impertinently set forth."

A reference having been made to the master, in the usual form, he certified, amongst other things, that he found the answer impertinent as to the whole of the sixth exception.

The defendants having excepted to that part of the report, the Master of the Rolls made the order now appealed from, allowing the defendants' exception.

The appeal now came on to be heard.

[\*269] Mr. *Wigram* and Mr. *Collins*, for the appellant.—"The master has come to a right conclusion in finding the whole of this schedule to be impertinent. It may be true that no part of it is irrelevant; but the whole is oppressively prolix, and prolixity in pleading is itself impertinence: if it were not to be so considered, a party could never protect himself against this kind of oppression without taking exceptions still more voluminous than the matter of which he complains. Accordingly, it has been settled by a series of decisions, that where impertinent matter is so mixed up with pertinent that the one cannot, without great difficulty, be separated from the other, the whole shall be treated as impertinent. *Alsager v. Johnson*, (a) *Parker v. Fairlie*, (b) *Norway v. Rowe*, (c) *Slack v. Evans*, (d) *Beaumont v. Beaumont*, (e) *Beames's Orders*. (g) The Master of the Rolls, indeed, admitted, that before the orders of 1828, the present case would have fallen within

(a) 4 Ves. 217.

(d) 7 Price 278, n.

(b) Turn. & Russ. 362.

(e) 5 Mad. 51.

(c) 1 Mer. 347.

(g) P. 70.

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 1841.—Byde v. Masterman.
 

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that rule, but his lordship conceived that the eleventh of those orders, as expounded by Sir J. Leach in *Wagstaff v. Bryan*,<sup>(a)</sup> had introduced a different rule; and that, inasmuch as a few detached passages might be found in the twelve brief sheets over which this schedule extends, which were neither irrelevant nor unduly prolix, the master was bound to have overruled the exception altogether. It is submitted, however, that the eleventh order was intended to apply to impertinence, in the sense of irrelevancy only, and not of prolixity; or, at all events, to those cases only of prolixity in which the objectionable passages could easily be separated from the rest. In the present case, that attempt was made, but before the pleader had gone through half the schedule, the exceptions were found to amount to 200 in number.

\*THE LORD CHANCELLOR:—No one disputes that prolixity is impertinence: but then, it is said, comes the difficulty of the general order. I confess, however, I do not yet see the difficulty: for, if the matter becomes altogether impertinent by being unnecessarily expanded, the order does not affect such a case. [\*270]

Mr. Bethell and Mr. Piggott, *contra*.—Under the old practice, the same particularity was required in taking exceptions to the master's report, which is now required by the eleventh order in taking exceptions to the answer; and if, from particular circumstances, a party found it impossible to conform to that rule, his course was to apply for leave to file a general exception.<sup>(b)</sup> The same course ought to have been adopted here, if the plaintiff was really, as he alleges, unable to comply with the requisitions of the eleventh order.

To say that prolixity is impertinence, is too large a proposition. Sir J. Leach, in *Lowe v. Williams*,<sup>(c)</sup> says it is a matter to be dealt with on the question of costs at the hearing. Besides, there are whole passages in this schedule which cannot, in any sense, be called impertinent. The intermixture of the freehold parts of the estate with the copyhold, the inquiry as to their value, and the peculiarities in the title, rendered it impossible to give the information sought for by the bill without an unusual particularity of description; and whatever parts of the schedule are really objectionable on the ground of diffuseness, might have been expunged separately. It is unnecessary, therefore, to contend that the eleventh order has [\*271] overruled the doctrine of *Norway v. Rowe*,<sup>(d)</sup> because that doctrine has never been applied, except where it has been found impossible to separate what was pertinent from what was impertinent, *Tench v. Cheese*;<sup>(e)</sup> which is not the case here.

Even supposing, however, that this schedule may properly be the subject of a general exception, this exception is bad in form; for it complains, not

(a) 1 Russ. & Mylne, 28.

(b) Vide *Norway v. Rowe*, 1 Mer. 135, see p. 140.

(c) 2 S. & St. 574.

(d) 1 Mer. 135.

(e) 1 Beav. 571.

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that the schedule is impertinent, but that it is impertinently set forth. It was the duty of the master either to allow or to disallow the exception, and not to certify what the exception did not allege; and if he had done so, the court would have had no power to order matter to be expunged which was merely found to be impertinently set forth: that shows that an exception so worded is irregular, and ought not to be entertained at all.

On coming into court the next morning,

*May 1.*—THE LORD CHANCELLOR stopped Mr. *Wigram*, who was proceeding to reply, and said,—I have looked over the schedule in this case; and it appears to me that the difficulty of dealing with cases of this kind would be insurmountable, if this order is to stand. It is founded on the practice supposed to have been introduced by the eleventh general order, and the case of *Wagstaff v. Bryan*. Formerly, the practice was to refer pleadings for impertinence upon a general exception: it was, however, found to be inconvenient

not to specify the passages which were objected to; and that led to [\*272] the eleventh order being made. But \*the difficulty of applying that

order, in the way that has been suggested, to a case like this, would be insuperable. Suppose you were to apply it in the case of *Norway v. Rowe*; you would have to file as many exceptions as there are passages complained of; and it would be impossible to set forth any extended passage, for fear of including some matter which was not impertinent. That cannot be the practice of the court. Lord Eldon's objection to the schedule in *Norway v. Rowe*, was not that any part of it was irrelevant, but that the information required was given in a needlessly diffuse and oppressive manner; and what he said then, and what had been said before, was, that where that which is impertinent is so mixed up with that which is pertinent that the one cannot be separated from the other, the whole must be treated as impertinent. Now, I do not say that there are not in this schedule some few passages that are free from the objection to which by far the greater part of it is undoubtedly liable; but why should the trouble be thrown on the court or the suitor, of analysing a schedule like this, merely because the defendants have thought fit—whether from negligence or design is immaterial—to frame it in a manner which the court ought not to sanction. If they choose to set forth the information which is asked with an unnecessary degree of diffuseness and prolixity, they must abide by having it treated as altogether impertinent. You must either deal with it in that way, or compel the plaintiff to take as many exceptions as there are objectionable sentences, or parts of sentences, in the schedule. I think, therefore, that the case falls within the principle of *Norway v. Rowe*; and so thought the Master of the Rolls; but he felt himself more bound by the eleventh order than I think either convenient or necessary

for if it were to be applied with that degree of strictness, the [\*273] consequence would be that the worse \*the case was the more impossible it would be to remedy it.

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It was then objected that I could not entertain the exception, on account of the unusual form in which it is expressed, the exception, being that the schedule is impertinently set forth. It is too late, however, to take that objection; for the order of reference refers it to the master to inquire whether the answer is impertinent in the points excepted to. The objection, therefore, ought to have been made, if at all, to the reference. There is, however, in fact, no force in the objection; for no one could doubt what the meaning of the expression was, namely, that the schedule was impertinent, because impertinently set forth.

Upon the whole, therefore, I am of opinion that the master's report was correct, and that the exception to it must be overruled.[1]

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\**BLEWITT v. ROBERTS* and others.

[\*274]

1841: May 1; August 4.

A testator bequeathed to his wife 600*l.* per annum for her life, to be paid quarterly, and after her death the said annuity to be equally divided between six persons, whom he named, or the survivors or survivor of them. He also gave to each of these six persons 100*l.* per annum during their lives, to be paid quarterly, with power to leave their said respective annuities at their deaths to any persons they might marry, or any children they might leave: but in case of any of them dying without exercising such power, then to the survivors or survivor. Held, reversing the decree below, that the gifts over of the annuities of 600*l.* and 100*l.* respectively were not gifts of so much stock in the three per cents. as would produce those annuities, but gifts of annuities for the respective lives only of the persons, to whom they were limited, as tenants in common.

THE will of Edward Blewitt, dated the 12th of October, 1830, was partly as follows:—"I give to my wife Rachael Blewitt all my plate, linen, and furniture; and I appoint my said wife and my son Edmund Blewitt and Wightwick Roberts executors and trustees of this my will. And I give to my said wife 600*l.* per annum for her life; but not to be liable to the control of any future husband; but to be paid quarterly, from time to time, to her, on her receipt only, and not to be subject to any debts or assignment: and after her death, the said annuity to be equally divided between Ann Rogers Blewitt, Thomas Rogers Blewitt, Henry Blewitt, Georgiana Blewitt, Byron Blewitt, and Oscar Blewitt, or the survivors or survivor. I also give to each of them, the said Ann Rogers Blewitt, Thomas Rogers Blewitt, Henry Blewitt, Georgiana Blewitt, Byron Blewitt, and Oscar Blewitt, 100*l.* per annum during their lives, to be paid quarterly, with power to leave their said respective annuities at their deaths to any persons they may marry, or any child or children they may leave; but in case of any of them dying without exercising such power, then to the survivors or survivor. I give also to each of

[1] *Davis v. Cripps*, 2 *Yo. & Coll. C. C.* 435; 1 *Russ. & M.* 31, n. 1; 1 *Sim. & Stu.* 301, n. 1; 2 *Sim. & Stu.* 577, n. 1.

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them, the said Thomas Rogers Blewitt, Henry Blewitt, Byron Blewitt, and Oscar Blewitt, as they arrive at twenty-one years of age, or before, if my said trustees shall think fit, 400*l.* to put them out in life. But if either [\*275] of the said last named legatees \*die before twenty-one years of age, or before such money be paid to him, to the survivors or survivor. All the residue of my property I give to my son Edmund Blewitt, if he should survive me. But in case of his death, to my son Reginald James Blewitt; and in case of his death also before me, to my daughter Frances Mary Ann Blewitt."

The testator died on the 8th of March, 1832, leaving his widow, Rachael, and the six other annuitants mentioned in his will, who were his illegitimate children by Rachael before their marriage, surviving him.

Shortly after the testator's death, his son Edmund having died in his lifetime, this suit was instituted by Reginald James Blewitt, as residuary legatee, against the defendant Roberts and the widow, who had proved the will, and the six illegitimate children, for the purpose of having the rights of all parties declared, and the trusts of the will administered under the direction of the court.

Pending the suit, Henry Blewitt died, unmarried; then Rachael died; and afterwards Oscar Blewitt died, also unmarried; and Ann Rogers Blewitt married Robert Stauffer. These circumstances were stated in a supplemental bill.

Upon the hearing of the cause for further directions, before the Vice-Chancellor,[1] his honor declared, that upon the death of Rachael Blewitt an amount of stock in the three per cents. sufficient to produce the annual sum of 600*l.* bequeathed to her during her life, became absolutely vested in and divisible in equal shares between and amongst Ann Rogers Stauffer,

Thomas Rogers Blewitt, Georgiana Blewitt, Byron Blewitt, and Oscar [\*276] Blewitt, as being the survivors of themselves and Henry Blewitt, living at the death of Rachael Blewitt: and that, upon the death of Henry Blewitt, an amount of like stock sufficient to produce his annuity of 100*l.* became absolutely vested in the same parties, as joint tenants: and that, upon the death of Oscar Blewitt, he not having done any act to sever the joint tenancy, his share of the last mentioned amount of stock, as well as the amount of like stock sufficient to produce his original annuity of 100*l.* became absolutely vested in Ann Rogers Stauffer, Thomas Rogers Blewitt, Georgiana Blewitt, and Byron Blewitt, as joint tenants.

An appeal, presented by the plaintiff, from this decree, now came on to be heard.

Mr. *Wigram* and Mr. *Macdonnell* in support of the appeal.—It cannot be disputed that a gift of a rent charge without words of limitation, is a gift for the life only of the donee: and there is no ground, either in principle or au-

[1] The case before the Vice-Chancellor is reported 10 Sim. 491.



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thority, for applying a different rule to the gift of an annuity out of personal estate. Lord Hardwicke, when speaking of such annuities, in *Earl of Stafford v. Buckley*,<sup>(a)</sup> says, that when limited to the heirs, they are personal inheritances. And Lord Coke says, if an annuity be granted to a man and his heirs, it is a fee simple personal ;<sup>(b)</sup> propositions which seem to imply that a mere indefinite gift of an annuity without words of limitation, would not be sufficient to create an interest in perpetuity. It will be attempted, perhaps, to compare this case with those in which it has been held that an indefinite gift of the dividends of stock is a gift of the stock itself, and that a like gift of the interest of a sum \*of money is a gift of the [\*277] capital. There is, however, no analogy between that class of cases and the present, any more than there is between an indefinite gift of the rents and profits of land, which has also been sometimes held to carry the fee simple, and an indefinite gift of a rent charge, which, it must be admitted, would pass only a life estate. Accordingly, it has never yet been decided that the mere gift of an annuity, *eo nomine*, without words of limitation, would give the donee a right to it in perpetuity, until the case of *Tweedale v. Tweedale*,<sup>(c)</sup> lately decided by the Vice-Chancellor, and which may be considered as the foundation of his honor's judgment in the present case. The cases of *Turner v. Turner*,<sup>(d)</sup> *Innes v. Mitchell*,<sup>(e)</sup> *Livesey v. Livesey*,<sup>(g)</sup> *Ex parte Annandale*,<sup>(h)</sup> *Jones v. Randall*,<sup>(i)</sup> are all inconsistent with such a doctrine. And in *Savery v. Dyer*,<sup>(k)</sup> Lord Hardwicke expressly says, "If one gives by will an annuity not existing before to A., A. shall have it only for life."

Independently, however, of the abstract rule of law upon the subject, we submit that the subsequent gifts in this will of gross sums of 400*l.* to each of the annuitants on their attaining twenty-one, with limitations over to the survivors if any die under that age, afford a strong presumption that, in giving these annuities, the testator intended to give life interests only, and not any part of the *corpus* of his estate.

Mr. Jacob, Mr. Girdlestone, Mr. Sharpe, and Mr. Loftus Wigram, for the surviving annuitants.—\*What has been cited, as laid down [\*278] by Lord Hardwicke in *Savery v. Dyer*, was merely a *dictum* ; because in that case the duration of the annuity was expressly specified by the terms of the gift : and the other authorities which have been mentioned are not irreconcilable with the decision in *Tweedale v. Tweedale*, which, however, goes far beyond this case ; for without contending for the abstract proposition laid down by his honor, that an annuity given simply, is an annuity given absolutely, it is sufficient for the present purpose to say, what will hardly be disputed, that the term annuity, especially in wills, is indefinite in its import, and that its meaning must be ascertained in each case by reference

(a) 2 Ves. sen. 170. (b) Co. Lit. 2 a. (c) 9 Law Journ. 147, now reported in 10 Sim. 453.  
 (d) 1 Bro. C. C. 316. (e) 6 Ves. 464, and 9 Ves. 212. (g) 3 Russ. 287.  
 (h) 4 Deac. & Ch. 511. (i) 1 J. & W. 100. (k) Amb. 139. see p. 140 ; 1 Dick. 162.

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to the context of the instrument ; and the context of this will contains quite enough to show that in the gift of one of these annuities, the testator must have conceived that he was dealing with a capital sum, and not merely a life interest. In the first place, where he intends to give a life annuity only, he directs, that those annuities shall be payable in a particular manner—quarterly—while the gifts over are wholly indefinite both as to duration and the mode of payment. Then what is it, in each case, that is given over ? In the case of the annuity of 600*l.*, it is “the said annuity ;” in the cases of the annuities of the children, it is “their said respective annuities.” According to the construction for which the appellant contends, there would be nothing upon which these words could operate : because, by the supposition, “the said annuities” would be extinct by the death of the first takers.

Besides, what can be more improbable than that the testator should have intended to convert the annuity of 600*l.*, upon the death of the widow, into six different annuities, dependent, respectively, upon six different lives ; or to

subdivide a small annuity of 100*l.* into as many fractional annuities  
[\*279] as the annuitant might happen \*to leave children ? All these incon-

sistences would be avoided by treating this as one of the class of cases in which the gift of an accruing sum to one for life, and then over to another has been construed to be an absolute gift to the latter, subject to the life interest of the former ; *Clough v. Wynne*,(a) *Philipps v. Chamberlaine*,(b) *Rawlings v. Jennings*,(c) *Stretch v. Watkins*.(d)

Mr. Neate appeared for the defendant Roberts, the surviving executor.

Mr. Wigram, in reply.

Aug. 4.—THE LORD CHANCELLOR:—The first gift is 600*l.* per annum to the testator's wife, for her life ; and, after her death, the said annuity to be equally divided between six persons named, or the survivors or survivor. The Vice-Chancellor has decided that these six persons are entitled, after the death of the widow, to so much 3 per cent. stock as would produce 600*l.* per annum. His honor has decided the same point in *Tweedale v. Tweedale*,(e) and is there made to express his opinion thus : “I have always thought, that if there be a gift simply of 100*l.* a year to A., it is a gift of that sum which shall be sufficient to produce 100*l.* a year.” The cases referred to in the argument before me of this case, do not support that proposition. In *Clough v. Wynne*,(a) the gift was of the interest of the residue to A. for life, and at her decease to the plaintiff, and Sir Thomas Plumer held, that the *corpus* of the residue passed. Giving the interest of personalty without limitation, passes the whole interest, unless there are  
[\*280] \*words to confine it to a life interest. *Stretch v. Watkins*,(d) decided by the same judge, was an unlimited gift of the produce of stock.

(a) 2 Madd. 188.

(b) 4 Ves. 51.

(c) 13 Ves. 39.

(d) 1 Madd. 253.

(e) 9 Law Journ 147 ; now reported in 10 Sim. 453.

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A very different principle applies to that case; for as the public funds consist only of perpetual annuities an unlimited gift of the produce of stock necessarily exhausts the whole subject matter. In *Philipps v. Chamberlaine*,<sup>(a)</sup> Lord Alvanley thought that the terms used in the residuary clause were sufficient to carry the principal as well as the interest. In *Rawlings v. Jennings*,<sup>(b)</sup> Sir W. Grant relied upon expressions showing an intention to give the capital. Those decisions are founded upon the general principle, that a gift, without limit as to time, of the produce of the fund, amounts to a gift of the fund itself; and when it is clear that the gift of the produce of the fund, is without limit as to time, it is impossible not to adopt the conclusion that the fund itself is given; but if expressions are to be found showing an intention that the gift of the produce should be limited as to time, such limit will be the measure of the gift.

There is a marked distinction between the gift of the produce of a fund without limit as to time, and a simple gift of an annuity. An annuity may be perpetual, or for life, or for any period of years; but, in the ordinary acceptance of the term used, if it should be said that a testator had left another an annuity of 100*l.* per annum, no doubt would occur of the gift being an annuity for the life of the donee. It is the gift of an annual sum of 100*l.*; that is, of as many sums of 100*l.* as the donee shall live years. In *Savery v. Dyer*,<sup>(d)</sup> Lord Hardwicke says, "If one give by will an annuity not existing before, to A., A. shall have it only for life." In that case, the gift was of an annuity to A. during the "life of B., and B. having sur- [281] vived A., the question was, whether the annuity had ceased, notwithstanding the express provision that it should be during the life of B.

It is singular that no other case has been referred to, in which this question distinctly arose; but in *Innes v. Mitchell*,<sup>(d)</sup> before Sir W. Grant, and before Lord Eldon,<sup>(e)</sup> upon appeal, the annuity was held to be for life only, although there were provisions leading more strongly than anything in this case, to an inference that the capital was intended to be given, such as the direction as to the 5000*l.*; without that direction the gift would be of an annuity of 200*l.* to the use of a mother and her children, for her and their use, and the longest liver of her and her children, subject to an equal division of the interest while more than one of them should live; a gift not very dissimilar from the present; and both those very able judges held that the annuity determined with the life of the survivor. If the gift simply of an annuity of 100*l.* to A. is a gift of that sum which shall be sufficient to produce 100*l.* a year, there was sufficient in *Innes v. Mitchell* to give to the

<sup>(a)</sup> 4 Ves. 51.<sup>(b)</sup> 13 Ves. 39.<sup>(c)</sup> Amb. 139.<sup>(d)</sup> 6 Ves. 464.

<sup>(e)</sup> 9 Ves. 212. The bequest in that case was as follows:—"I give to Mrs. Janet Innes, relict of my late nephew Alexander Innes, 200*l.* per annum for the use of herself and children; which annuity is to be paid out of my general effects until it is convenient to my executors to invest 5000*l.* in the funds, in lieu thereof, for her and their use, and to the longest liver of her and her children, subject to an equal division of the interest while more than one of them alive."

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mother and her children such a sum as would be sufficient to produce 200*l.* per annum, without reference to the provision as to the 5000*l.*; and yet, notwithstanding that provision, it was held that there was no gift of any principal sum. It seems to have been supposed, that the direction that there should be an equal division of the annuity, implied that the principal [\*282] \*producing the annuity was to be the subject matter of the division; but there was a similar direction in *Innes v. Mitchell*, and in *Jones v. Randall*;(a) and yet, in neither of those cases, was there any gift of the principal.

It does not appear to me that there is any inconsistency in the cases. To hold that a simple gift of an annuity to A. does not give an annuity beyond the life of A., is not inconsistent with holding that a gift of the produce of a fund without limit as to time gives the fund itself. In the former case, there is no allusion to any principal sum. It is, indeed, the course of this court to secure an annuity by investing a capital sum; but a testator with an income much exceeding the annuity given is not very likely to contemplate any such investment. He may, indeed, be without the immediate means of making it; as, for instance, if his whole property consisted of long leaseholds. If a testator were minded to give 10,000*l.*, can it be supposed that he would set about effecting this object by giving 500*l.* per annum to the intended legatee, without making any mention of 10,000*l.* or of any other capital sum? To carry into effect the gift of an annuity of 500*l.* by raising 10,000*l.* out of the estate, would, probably, be very foreign from the testator's intention. I feel no disposition to question the doctrine laid down by Lord Hardwicke, and followed in the cases I have referred to; and if I did, I should not feel at liberty to depart from a rule established upon such authority.

The petition of appeal contains a claim, on the part of the residuary legatee, to the sixth part of the annuities given to Henry Blewitt, who died in the lifetime of the tenant for life; but it appears to me that as to the [\*283] 600*l.* per annum, the five survivors are entitled to the \*whole as tenants in common. The gift is to the mother for life, and after her death, to the six children, equally to be divided between them, or the survivors or survivor. The subject matter of the gift is an annuity of 600*l.*, and the period of division was the death of the mother, and to that period the survivorship refers, and at that time there were but five living. The same result attaches to the 100*l.* per annum given to Henry, although for a different reason, for in that gift there was no prior estate for life, but the survivorship is between the annuitants, in case of any of them dying without exercising the power given.

The Vice-Chancellor's decree must be reversed, and a declaration to the above effect substituted.[2]

(a) 1 Jac. & Walker, 100.

[2] A testator bequeathed an annuity of 500*l.* a year to his daughter for life, and directed an in-

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The effect of the declaration which was substituted for that of the Vice-Chancellor, in pursuance of this judgment, will be found accurately stated in the 10th vol. of Mr. Simons' Reports, p. 493; and see Reg. Lib. A. 1840, fol. 1269.

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HILTON v. THE EARL OF GRANVILLE.

1841: June 16, 18.

An injunction to restrain the working of valuable mines refused, under the circumstances, on condition of the defendant's making certain admissions for the purpose of enabling the plaintiff to bring an action, although there was reason to apprehend that if the working was continued, the plaintiff's houses upon the surface would be totally destroyed or irreparably damaged before the legal right could be decided.

A MOTION had been made, by the plaintiff in this cause, before the Master of the Rolls, that the defendant might be restrained by injunction from mining beneath the plaintiff's two messuages and lands mentioned in the bill, or in the vicinity thereof, in such a manner as in any way to damage [\*284] or endanger them or their foundations. The Master of the Rolls having simply refused the motion, it was now renewed, by way of appeal, before the Lord Chancellor.[1]

The plaintiff's case, as stated upon the bill, and supported by affidavits, was, that the houses in question were copyhold of the manor of Newcastle-under-Lyne, which belonged to the Crown in right of the Duchy of Lancaster, and that they had been built upwards of thirty years; that the manor ex-

vestment in the funds for securing it, (which was accordingly done by the purchase of 16,666*l.* 13*s.* 4*d.* consols for securing the annuity,) and after her decease, he directed the "annuity" should go as his daughter should by will appoint, and in default, the "annuity" should be applied towards the maintenance of her children till twenty-one, and then "the principal sum" to the children, with a gift over "of the said principal sum of money." The daughter, by will, made an appointment of the 500*l.*, a year, and so far as she could or might of the said sum of 16,666*l.* 13*s.* 4*d.* consols invested for securing that annuity. The Master of the Rolls, (Lord Langdale,) held that the daughter was authorized to appoint the capital. *Samuda v. Lousada*, 7 Beav. 243. Upon the construction of a will it was held, that a bequest of 30*l.* a year, from "the interest of the testator's funded money in the Bank of England," did not amount to a bequest of so much stock as would produce that annual sum, but constituted an annual charge of 30*l.* upon the funded property for the life of the legatee. Knight Bruce, V. C. "I do not at all dispute that generally, an unlimited bequest of the income of stock, is to be construed as an absolute gift of the stock itself. I cannot however read the bequest in this will as importing so much. What the testator gives is an annuity of 30*l.* a year, part of the stock. A life annuity may be charged upon stock as well as any other property, &c." *Wilson v. Maddison*, 2 Yo. & Coll. C. C. 372. Bequest of an annuity to A. and B. and to the survivor for life; and if A. should have any children, then to be equally divided between them; but if A. should die "without lawful issue" then to A. and his heirs forever; it was held the word "issue" here being construed to mean "children," (a point immaterial to the present topic,) that the children of A. took absolute interests in a perpetual annuity. *Robinson v. Hunt*, 4 Beav. 450; and see 10 Sim. 494, n. 1.

[1] The case before the Master of the Rolls is reported 4 Beav. 130.



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tended over the township of Hanley, and the adjoining township of Shelton, and that the greater part of the property in those townships was also of copyhold tenure; that it had been the practice of the Crown, from time to time, to grant leases of the coal mines lying beneath the copyhold parts of the manor; and that although it had been long known that iron stone of an inferior description, and in small quantities, could be obtained in the manor, and certain portions had been from time to time brought to field together with, and generally as incidental to, the getting of the coal, yet that it was, in or about the year 1832, for the first time, discovered that there were, beneath the surface of those townships, large and valuable seams or veins of iron stone, lying for the most part above the beds of coal, and much nearer to the surface, in consequence of which discovery the defendant, who had, for some years past, been lessee from the Crown of all the mines of coal and iron stone beneath the manor, shortly afterwards began to mine for iron stone under the copyhold parts of the manor; such operations, however, being, for a considerable time, carried on to a comparatively small extent, and with some regard to the stability of the surface and the buildings upon it, by means of old coal shafts; but that in the month of October, 1839, the defendant's [1285] agents had sunk a new shaft in a copyhold field adjacent to the town of Hanley, from which they had carried a level under ground across the line of Union Street, in which the houses in question were situated, and two other streets parallel to it, at a depth of sixty-two yards from the surface, and at a distance of sixty-seven yards from the plaintiff's houses; and that the mine formed by such level had ever since been worked for iron stone exclusively: that during the last few months it had been given out by the defendant's agents and workmen that his mining operations for iron stone would be carried on to a far greater extent than formerly, and beneath the most populous parts of the said townships, and wholly without regard to the property of the copyholders: that such actual and threatened operations having created great alarm and anxiety amongst the copyhold proprietors within those townships, a large body of them, in the month of February, 1841, caused notices signed by them, to be served on the auditor and on the mining agent of the defendant, who was then resident in Paris, intimating that if any of the mining operations should be attended with injury to their property, an application would be made to the Court of Chancery for an injunction: that the operations had, however, been continued, notwithstanding such notice, and that the plaintiff, having reason to apprehend from the injuries from time to time happening to various houses in his neighborhood, which were situated nearer to the level than his own, that the workings of the mine were progressively advancing towards his houses, had, on the 11th of March, 1841, caused written notices to be served on the defendant's auditor and his mining agent to the effect that, unless they forthwith desisted from mining operations, by which his premises might be injured or endangered, and unless within seven days from the 15th of March instant, they informed the plaintiff that.



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they had so desisted, he should immediately apply to the Court of Chancery for an injunction: \*that after such notice the plaintiff had [\*286] trusted that the mining operations would be carried on so as not to endanger his houses, and that his legal advisers had considered that the damage to his property was not then so certain as to justify an application to the court; but that from the circumstances after stated, he had discovered that the workings of the mine had ever since been carried on as near to the surface, and in the same direction towards his houses as theretofore, and that in consequence thereof, and since the expiration of the period mentioned in the notice, many other houses in the three streets before mentioned, situated farther from the level and nearer to the plaintiff's houses than those previously injured, had been greatly and irreparably damaged, some of them having been rendered wholly uninhabitable, and having in fact been deserted by the occupiers, from an apprehension of their falling in. That until the last fourteen days, however, the injury occasioned by the working of the mines had not advanced nearer to the plaintiff's houses than about forty-five yards off, but that during that period it had suddenly advanced a great distance towards them, and that within the last seven days the walls and ceilings of the house immediately adjoining the plaintiff's had cracked, and other houses lower down the same street had also suddenly become damaged; from which it was evident, that, unless the operations then going on should be immediately restrained, the plaintiff's houses would be rendered uninhabitable, and fall to ruin.

With regard to the last point, namely, the damage to be apprehended by the plaintiff from a continued working of the mine in the direction of his houses, the plaintiff's evidence was scarcely controverted; but with respect to the other parts of the case, it appeared from the affidavits filed on the part of the defendant, that there were in the office of the Duchy of Lancaster, \*records, from the time of Richard the Second downwards, of [\*287] leases granted by the Crown, in right of the Duchy, of the mines of iron stone as well as of coal within the manor, and that the lease under which the defendant was now mining, as well as all the leases which had been previously granted to him and to his late father, who had been the Crown lessee before him, had, in like manner, included both descriptions of mines.

With respect to the mode of working the mines under those leases, it was stated by several mining agents and other persons who had been employed about them during the time of the defendant and his late father, that although the ironstone mines had been worked to a greater extent since the year 1832, than before, in consequence of the increased demand for iron which arose about that time, yet that as far back as living memory extended, injuries to buildings upon the surface, similar to those now complained of, had, from time to time, occurred, and that such injuries had always been repaired by the owners of the buildings at their own expense, or that, if compensation had in any case been made, it had been made as a matter of favor

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and not of right, it being notorious in the neighborhood that all buildings on the copyhold parts of the manor were erected at the risk of the copyholders, and were subject to the rights of the lessees of the mines. That statement was, in some degree, corroborated by a memorial, which had been addressed to the defendant, in the year 1826, by seventy copyholders within the townships of Hanley and Shelton, complaining of injuries to their buildings from the working of the mines, and demanding compensation: in answer to which the defendant had distinctly denied his liability to make such compensation;

at the same time reminding the memorialists that those who had [\*288] erected houses upon the copyhold parts \*of the manor, had done so in defiance of an express caution from his agents, independently of their general knowledge that the mining would be carried on without regard to the buildings upon the surface, in whatever direction the interest of the lessee might suggest. In fact, it appeared, that for a long time previous to the year 1832, written notices, to that effect, had been served by the defendant's agents upon all persons who were proceeding to build upon the copyhold parts of the manor. It appeared moreover, that one of the defendant's mining agents, against whom an action of trespass had been brought by one Paddock, a copyholder, in the year 1840, for damage alleged to have been done to his land by the mining operations, had pleaded, amongst other things, that the Crown, as lord of the manor, and its lessees, had a right, by custom to get the mines, making a reasonable compensation to the tenants, when demanded, for all damage thereby occasioned to property upon the surface: upon which plea, issue having been joined, the defendant in the action had obtained a verdict, subject to a point reserved, which had not yet been disposed of in the court of law.

It was further stated, on the part of the defendant, that so long ago as the year 1832, his auditor had called upon some of the principal copyhold proprietors in the townships of Hanley and Shelton, and offered to afford them every facility, by admission of damage, which might be necessary for the purpose of trying the right, asserted by the defendant, in a legal proceeding; but that notwithstanding such offers, no action had ever been brought, by any of the copyholders, against the defendant or his agents, except one, by a person named Brown, in the year 1832, which had been afterwards abandon-

ed, and that brought by Paddock, as above mentioned. It also ap- [\*289] peared, that several of the persons to whom those \*offers had been made, were subscribers to a fund which had been raised amongst the copyholders for the purpose of enforcing their claim to compensation from the defendant, and out of which it was alleged, and not denied, that the expenses of the present suit were to be defrayed.

It also appeared, that the defendant had, within the last three years, expended about 50,000*l.* upon his collieries and iron works at Hanley; and that the ironstone of the mine in question being of a peculiar quality, and a necessary ingredient in all the iron manufactured at the works, the getting of it

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could not be stopped for one week without a loss to the defendant of four or five times the value of the fee simple of the plaintiff's houses, which were estimated to be worth, at the utmost, not more than 200*l*.

Mr. *Wigram*, Mr. *Bethell*, and Mr. *Hardy*, in support of the motion, contended that the case was one which called peculiarly for the interference of the court, whether regard were had to the nature of the right which was asserted by the defendant, or to the consequences likely to ensue from its exercise. The right asserted was a right in the lord of the manor to destroy the property which he had granted to the copyholder. Now that a grant might be qualified and narrowed by a customary reservation, not inconsistent with the enjoyment of the thing by the grantee, in some form or to some extent or other, was intelligible: but a reservation which went to the absolute annihilation of the grant was an absurdity, and could not be supported by any custom; because such a custom would, upon the face of it, be unreasonable and illegal; *Bourne v. Taylor*,<sup>(a)</sup> *Wilkes v. Broadbent*,<sup>(b)</sup> [\*290] *Badger v. Ford*,<sup>(c)</sup> *Arlett v. Ellis*,<sup>(d)</sup> *Harris v. Ryding*,<sup>(e)</sup> In the present case, however, no such custom was even proved to exist. All that was proved was a custom to grant leases of the mines: there was, indeed, some evidence of a practice having prevailed for some years of working the mines in such a manner as to cause damage to the property upon the surface; but such a practice could not establish a customary right as against parties who had never recognized or submitted to it: and there was no evidence of the damage having, in former times, gone to the extent which was threatened by the present mode of working: for it was not a single tenement merely, but a whole town that was now threatened with destruction. A right of so novel and arbitrary a kind, and pregnant with such consequences, the court could not assume to be valid, until it should have been established in a court of law. It was no fault of the plaintiff that he had not had an opportunity of contesting the right until it had threatened imminent destruction to his property: for though the shaft, from which the mischief originated, had been sunk in the year 1839, he had had no means of knowing that the mine was to be run in the direction of his house, until he was informed of it by the damage sustained, in the progress of the works, by the houses in his neighborhood, and then he had lost no time in applying to the court.

Mr. *Knight Bruce*, Mr. *Turner*, and Mr. *Purvis*, *contra*, said that the fallacy of the argument, on the other side, lay in the assumption that the right claimed by the defendant was in the nature of a reservation out of the \*grant to the copyholder: whereas they insisted that it was [\*291] paramount to all other rights in the soil of the manor: for when it was considered what was the origin of the copyhold tenure, and at how early a period these mines were known of and their value understood, there

(a) 10 East, 189.

(b) 2 Str. 1224; 1 Wilson, 63.

(c) 3 B. &amp; Ald. 153.

(d) 7 B. &amp; C. 346.

(e) 5 Mees. &amp; Wels. 60.

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was nothing unreasonable in supposing that all grants of land to the tenants of the manor had, from the earliest times, been made with an understanding that they were to be subject to the consequences of mining, whatever those consequences might be; *Bateson v. Green*,<sup>(a)</sup> *Clarkson v. Woodhouse*,<sup>(b)</sup> *Folkard v. Hemmett*.<sup>(c)</sup>

They also insisted that the circumstances under which this suit had been instituted, were not such as to entitle the plaintiff to any favor with the court. If the rights of the lessee had not until lately been put in force against this particular copyholder, the assertion of them had long been a matter of notoriety in the manor, and the suit was to be considered as the suit not of the individual plaintiff on the record, but of the copyholders generally, who had subscribed to the expenses of it; and some of whom were proved to have had express notice of what was about to be done, before the works now in progress were commenced. If, after that warning, they had thought fit to stand by and allow the lessee to expend so large an amount of capital upon the faith of a right, the validity of which he had offered to them the means of contesting before it was attempted to be put in force, they were not now in a situation to ask for the interference of the court, until they should have

established the validity of that right by the judgment of a court of [\*292] law. Before this court interfered in a case \*of that kind, it was bound to consider the comparative injury which would arise from the destruction of a house on the one hand, and from the stoppage of valuable mines on the other; *Grey v. The Duke of Northumberland*,<sup>(d)</sup> *Semple v. Birmingham Railway Company*.<sup>(e)</sup>

*June 18.*—THE LORD CHANCELLOR:—This is one of the most difficult questions, as to the application of the jurisdiction of this court, that I have known.

The motion is founded on the principle, on which this court acts, of preserving property until a legal decision on the right can be had.[2] There is no other equity: it is an equity which this court exercises very beneficially in certain cases; and, no doubt, the subject matter, that is to say the house, is shown, by the evidence, to be exposed, in case of the workings being continued, to danger of damage, and probably, as the evidence stands, to danger of destruction. Even that, however, is obviously an injury which is capable of compensation by damages; but, at the same time, it comes within the principle of those cases where the act complained of threatens to destroy the subject matter in contest. In order to induce the court to interfere, for the purpose of protecting property pending the decision of a legal title, it is necessary for the plaintiff to show, at least, a strong *prima facie* case in support of the title to that which he asserts; and it is also necessary for him to

(a) 5 Term Rep. 411.

(b) Ibid. p. 412, n.

(c) Ibid. 417, n.

(d) 13 Ves. 236; 17 Ves. 281.

(e) 1 Nicholl, Hare & Carrow's Railway Cases, 120.

[2] See the next case.

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1841.—Hilton v. The Earl of Granville.

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show that he has not been guilty of any improper delay in applying for the interposition of the court—not acquiescence in the sense of conferring a right on another party, but acquiescence in the sense of [\*293] depriving him of the right to the interference of a court of equity.

Now, with regard to the law on the subject, I am desirous of abstaining from the expression of any opinion; but I am bound to look at it so far as it may serve as a guide to the decision I ought to come to upon this motion. Since the argument, I have looked at all the cases which have been cited; and certainly it is impossible to say that the law, as established by those cases, is, at present, in a state which enables any one precisely to determine what the result in the present case will be. There are very strong authorities in support of the plaintiff's proposition; and there are others which appear to me to be quite irreconcilable with the principle laid down in those cases. No doubt, the modern cases are in favor of the plaintiff. *Bateson v. Green* is the strongest case against him, and is not professedly overruled in any of the subsequent cases, though attempts have been made—a practice often resorted to, and, perhaps, not always very productive of good—to reconcile that decision with the others to which the courts have come. I find, however, these very contrary decisions; and I find the well known and established rule of copyhold law, that in the case of opening mines and in the case of timber, at least, there is nothing inconsistent in a custom which derogates from the grant. It is quite impossible to say, in the case of the common and ordinary copyhold grant of land, nothing specific passing between the parties, that the custom to enter on the land and cut down all trees is not a derogation from the grant, if you look at the nature of the grant and the terms used in it; the custom, however, overrides the grant, and the grant is taken subject to the custom; so that there is nothing inconsistent, unless there be something unreasonable, and therefore illegal \*in the [\*294] custom. Now, it is perfectly well established that a custom is good which authorizes the lord to come on his copyhold land to open a shaft and work a mine: it may be destruction to the copyhold, but if the custom is proved, it is a good custom. So it is a good custom for the lord, after having granted land with the timber growing on it, to enter on the land and to cut down the timber: if there is no custom, neither the landlord nor the tenant can cut down the timber: if there be a custom in favor of either the one or the other, the right exists, and the law will protect the exercise of that right. As a general proposition, therefore, that there can be no custom which derogates from the grant, I apprehend all the authorities, and the well known law on the subject of timber and mines, show that the principle cannot be carried to that extent. *Bateson v. Green*, undoubtedly, is a striking instance to the contrary.

In that state of the law, I find the history of these manorial rights, as far as the affidavits carry it back, to be this, that those rights have been universally exercised: they have been disputed and complained of, but exercised.



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No doubt, it is the interest of the lord, as far as he can, to carry on his works without damage to the surface; because, if he is to make compensation to the copyhold tenants for the damage done to the surface, it is quite obvious he is damaging himself by exposing himself to the liability of making compensation; but that there has been a long continued custom of working the mines without regard to the injury done to the surface, seems, from the affidavits in this case, to be clear.

In addition to that, I have this ground on which it appears to me I may safely proceed and am bound to act. I find that in Paddock's action, [\*295] in which the copyholder complained that the lord had acted illegally, and had done that which he was not justified in doing, by so working his mine as to create injury to the surface; the lord, by the fourth plea, does not dispute the fact, but says, "I had a right to do it; I had a right to work the mine properly," or whatever the word may be; "and I had a right to do you damage; but I am bound to make you compensation." Now, that is the proposition raised by the plea in an action of *tort*, not an action in which the tenant is claiming what has become due to him for the amount of damage done to his property, but an action in which the lord is justifying and asserting that he had a legal right to do that which he has done, admitting that the act done had caused damage to the plaintiff. On that plea, so stating the right, the jury had found a verdict for the defendant: and it is, at this moment, a subject of discussion before a court of law, what judgment is to be entered on the verdict so found.

I have, therefore, a custom established for a pretty long duration, and I have the verdict of a jury in favor of the lord's proposition, that he has the right.

In that state of circumstances, I have also this course of conduct on the part of the plaintiff. I find, from his own showing, that the level was made in 1839. That might have been made for other purposes, purposes in which the plaintiff might not be interested; but then, without giving any date, he states, that from the level the workings have continued advancing towards his house, at a considerable distance, undoubtedly, at the commencement—sixty-seven yards—but gradually proceeding towards his house, and that, within a certain space of time, the works have approached within an [\*296] ascertained number of yards from his house, the consequence of which has been injury to those houses under which the workings have been carried. It is only of late that they have approached near to his house, and it is only of late, therefore, that any damage has been sustained by the houses near to his. But from the moment that the workings were commenced from the level, in the direction of the plaintiff's houses, which was in the month of October, 1839, (inasmuch as it is stated, that wherever houses existed, under which the working was carried on, damage was sustained,) he must have known that there was every probability, at least, that the working, if continued, would bring him in contact with the assertion of



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1841.—Hilton v. The Earl of Granville.

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the lord's right and therefore make it necessary for him to apply for protection or compensation for the damage done. No application, however, is made until the time when the workings have approached so near to his house, that it is quite impossible to grant an injunction which shall continue till the legal right is ascertained, without altogether suspending the lord's works.

I pay no regard whatever to what has been urged before me as to an equity supposed to exist, not against the plaintiff, but against some persons who are said to have subscribed to the expenses of this suit. I can only decide between the plaintiff and the defendant; and if the defendant has not an equity to exclude the plaintiff from his right to the injunction, he cannot borrow it from some other person who may have subscribed to assist the plaintiff in asserting his right. Neither can I look at the circumstance which has been urged on the part of the plaintiff, of this mine being under a town, and therefore involving the interest of a number of persons. I have no persons before me but the plaintiff and the defendant, and I must dispose of this case on the motion raised by \*them without regard to the way [\*297] in which it may affect others. If other persons have a similar case, they may assert it, and they will receive the attention due to it; but I cannot depart from the rule of this court, because other persons may be interested in the result of a contest, which, before me, is merely a contest between the plaintiff and the defendant.

Under these circumstances, therefore, seeing the state in which the law appears to stand, without however expressing any opinion upon it, and considering that by granting the injunction I shall be stopping the working of a mine, a thing which, of all others, this court is most averse to do, (though it may under certain circumstances be compelled to do it,) considering also the great expense which has been incurred, and the great injury which, if the court should turn out to be wrong, would be inflicted on the party claiming the right to work the mine; and, on the other hand, the nature of the injury which the plaintiff may sustain if he turns out to be right; I have to determine, whether, balancing the question between these two parties, and the extent of inconvenience likely to be incurred on the one side and on the other, it is the most proper exercise of the jurisdiction of the court, to grant the injunction or to withhold it. Now, by withholding it, I certainly may expose the plaintiff not only to damage, but to an injury and a wrong; by granting it, on the other hand, I am exposing the defendant to what, in the event of my turning out to be mistaken in the view I take of the rights of the parties, will be an irreparable injury. The plaintiff's injury, if he sustains it, and ought not to have sustained it, will be, to a great extent at least, capable of reparation; it is a mere question of the value of the property, which may be compensated; whereas, by no possibility can the injury done to the \*lord be compensated, if he is prevented for a consi- [\*298]

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 1841.—Hilton v. The Earl of Granville.
 

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- derable length of time from exercising a right which, in a certain event, may turn out to be his to the full extent to which he claims it.

But though I think that I should not be properly exercising the jurisdiction of this court in stopping the working of the mine at this moment, I certainly have a right to put the parties in a position which will enable them, at the earliest possible time, to have this question at law decided between them; and, as Lord Eldon said in *Grey v. The Duke of Northumberland*, the parties declining to bring their alleged rights to a legal decision, would itself furnish a ground which would influence the decision of this court in the administration of the equity applicable to their rights. I propose, therefore, to order that this motion should stand over, the plaintiff undertaking to bring an action, to be tried at the next assizes for the county of Stafford; the defendant, for that purpose, admitting, which I understand he has always been ready to do, for the purpose of trying the right, that damage has been done by his working the mines. That will enable the parties to bring the case before me again during the sitting of the court. It may be, that the result of the action may enable me to dispose of it. It may, and probably will, be, that some questions of law will be reserved, which will not enable me to dispose of it at once; but, at all events, I shall have the opportunity of seeing what the case is after the trial, and I shall then be in a condition to deal with it more satisfactorily than I now can.[3]

[3] "It has sometimes been considered an established rule, that equity will not interpose to restrain a mere trespass.—In some cases, however, the court has very usefully interposed to restrain what appeared to be only a trespass. But the proposition is too large, that, in every case where parties are alleged to be about to commit a trespass which may be attended with destruction to a specific chattel, an injunction will be granted. Supposing the nature of the injury apprehended is such as to render it impossible to measure the amount in damages; or if the case be one in which any calculation of the amount of the injury must be purely speculative, the inclination of the court has in general been to protect the party in the enjoyment of the property in specie. For the purpose then of determining what should be done, I referred to the cases of *Bacon v. Jones*, (4 Myl. & Cr. 431,) and *Collard v. Allison*, (id. 487.) The result of the case of *Hilton v. Lord Granville* is, that the court may impose terms on both parties to proceed to an immediate trial, or deal with the case otherwise, according as either party may refuse or submit to such direction. In *Bacon v. Jones* Lord Cottenham appears to say, that the discretion of the court in dealing with the subject is unlimited. He puts it various ways, and says, that the court must exercise the best judgment it can, as to the most convenient course to be pursued. In this case, whatever title the plaintiffs have, is a purely legal title. That title is disputed.—Having now only to determine what I should do on the motion, I think I must treat the question as one of an adverse possession, and that I cannot therefore interfere in the plaintiffs' favor to the extent of giving exclusive possession of the ship. The defendants have not, by any act or communication with the plaintiffs, ratified or confirmed the act of the master; and if I were, by injunction, to give the plaintiffs the exclusive possession of the ship, I should of course enable them to trade with her, to carry her away from this country; and if not, to make a good title abroad; at least, enable them so to embarrass the defendants' title, if they have one, as scarcely to make the right worth pursuing. I should, in effect, practically decide the cause upon motion against the defendants. My opinion therefore, is, that at the utmost I ought not to do more than to take possession of the ship, in order to preserve her for the benefit of the party who eventually should be found entitled, and this, in the exercise of the extensive discretion which Lord Cottenham, in *Bacon v. Jones*, asserted to be

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 1841.—Harman v. Jones.
 

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The order, as drawn up, was as follows:—

“His lordship doth order that the plaintiff be at liberty to bring such action as he may be advised against \*the defendant, touching [\*299] the working of the mines in the bill mentioned. And it is ordered that the defendant do admit, on the trial of such action, for the purposes of such action, that the working by the defendant, his servants or agents, of the mines under the surface near to the plaintiff's houses in the said bill mentioned, hath caused damage to the foundations thereof; but such admission is not to be used for any other purpose, in this cause or otherwise, and is not to preclude the defendant from insisting, in any other proceeding than such action, that no such damage hath in fact been done. And it is ordered that the motion do stand over until after judgment shall have been obtained in such action, or until the further order of this court; and any of the parties are at liberty to apply to this court as there may be occasion.”

Reg. Lib. A. 1840, fol. 1233.

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### HARMAN v. JONES.

1841: July 26, 28.

The object of the interference of a court of equity, by interlocutory injunction, between two parties who are at issue upon a legal right, is solely the protection of the property in dispute until the legal right shall have been ascertained: and, therefore, such an injunction ought always to be accompanied by a provision for putting the question into a course of speedy investigation at law.

In this suit, which was instituted by the directors of the Sun Fire Office against certain persons who represented the Commissioners of Sewers, and who were proceeding, under the powers of certain acts of parliament, to appropriate, for the purposes of the acts, a piece of land upon which the Sun Fire Office carried on its business, and was then erecting new buildings, the Vice-Chancellor had granted an injunction to restrain the defendants and the Commissioners of Sewers, and all other their officers, agents, and workmen, from \*issuing, or causing or permitting to be issued, the [\*300] warrant or precept prepared as in the bill mentioned, and from taking or causing to be taken any step or proceeding for assessing the value of the land in the bill mentioned, or any part thereof, or any other step or proceeding therein, or otherwise from divesting the said land, or any part thereof, without or against the consent of the Sun Fire Insurance Company, and from molesting or interfering with the Sun Fire Insurance Company and the plaintiffs in continuing and carrying on their edifice erecting thereon, or in their

in the court, is a course I may pursue.” *Wigram, V. C. Ridgway v. Roberts*, 4 Hare, 116, 117. And see the two next cases. In *Hilton v. Lord Granville*, the plaintiff, pursuant to the Lord Chancellor's order, brought an action of trespass against Lord Granville in the Court of Queen's Bench. The case again appeared before the Master of the Rolls, in June, 1842, but on points distinct from those decided *supra*. See 5 Beav. 263.

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1841.—*Harman v. Jones*.

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peaceable and quiet possession and enjoyment, use and occupation, of their said land, or any part thereof, until the further order of the court.

The defendants now moved, by way of appeal, before the Lord Chancellor, that that order might be discharged.

Mr. *Richards* and Mr. *Lloyd* appeared in support of the appeal motion.

Mr. *Knight Bruce*, Mr. *Wigram*, and Mr. *Pole*, for the plaintiffs.

The argument turned entirely upon the construction and effect of the acts of parliament under which the Commissioners of Sewers derived their powers. On the conclusion of it,

THE LORD CHANCELLOR:—This order for an injunction, being unaccompanied by any direction for putting the question in a course of legal inquiry, not only restrains the defendants from taking the plaintiffs' premises,

but prevents them from obtaining the decision of a court of law upon [\*301] the right \*which they claim. It is said, the omission of such a direction was owing to its not having been asked in the court below; but it is the duty of the court to give such direction, whether it be asked for or not. The proper office of the court, upon an application of this kind, is not to ascertain the existence of a legal right, but solely to protect the property, until that right can be determined by the jurisdiction to which it properly belongs. It is the duty of this court to confine itself within the limits of its own jurisdiction; and, therefore, it is a fundamental error in an order of this kind, to assume finally to dispose of legal rights, and not to confine itself to protecting the property pending the adjudication of those rights by a court of law.

[His lordship then took a review of the several acts of parliament in question, and, without expressing any opinion upon the effect of them, said:]

I can sustain the injunction only upon the terms of its being accompanied with some provision for putting the question immediately into a course of legal investigation. The course I would suggest for that purpose, would be that the Sun Fire Office should forthwith bring an action, and that the Commissioners of Sewers should admit, for the purpose of the action, that they had committed an act of trespass upon the plaintiffs' premises; and in default of the plaintiffs bringing such action within a given time, the injunction must be dissolved.[1]

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No order was drawn up upon the appellants' motion, the cause having, in consequence of the Lord Chancellor's judgment, been compromised.

[1] As to the imposing of terms upon allowing an injunction, see the preceding case; and note 3, *ibid.* p. 298; also the next case.

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1841 —Sanxter v. Foster.

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**\*SANXTER v. FOSTER.**

[\*302]

1841 : May 28, 29.

*Semble.* The court will, in no case, interfere, upon an interlocutory application, to prevent a party from enforcing a legal right, without putting the party applying on such terms as will enable the court to do justice to the party restrained, in the event of the plaintiff in equity failing to make out a case for equitable relief at the hearing.

THIS was a suit by a tenant of a farm against his landlord, to restrain the enforcement of a penal rent reserved by his lease, on the ground that there was no stipulation for such penal rent in the memorandum of agreement under which the plaintiff had entered upon the farm, and in pursuance of which it had been intended, as he alleged, that the lease should be prepared.

The farm in question consisted of 700 acres, and the lease was for a term of fourteen years, at an annual rent of 480*l.*; in addition to which the lease provided for the payment of a penal rent of 10*l.* for every acre of land which the tenant should cultivate otherwise than according to the stipulations of the lease. The landlord having threatened to distrain for a large sum which he claimed to be due to him in respect of this penal rent, and having also brought an action of ejectment under the usual clause of re-entry, in consequence of the non-payment of the sum so claimed, the plaintiff filed this bill, praying that the lease might be rectified in conformity with the agreement, and that the defendant might be restrained, by injunction, from prosecuting the action which he had commenced, and also from levying any distresses or distress, upon the plaintiff's goods, founded upon, or in relation to any of the covenants or provisions in the lease which were not authorized by the agreement.

The plaintiff having obtained the common injunction to restrain the action of ejectment, afterwards moved before the Vice-Chancellor, that the defendant might be restrained from levying any distresses, &c. according to the prayer of the bill, and also that the common injunction might [\*303] be extended to stay trial.

His honor having granted the whole of the motion, the defendant, the landlord, now moved, by way of appeal, before the Lord Chancellor, to discharge so much of the Vice-Chancellor's order as related to the distresses.

Mr. *Wakefield*, and Mr. *Dixon*, appeared in support of the appeal motion.

Mr. *Knight Bruce*, Mr. *Wigram*, and Mr. *Willcock*, for the plaintiff.

THE LORD CHANCELLOR, in giving judgment, said, that though the case appeared to be one of considerable hardship upon the plaintiff, he was bound to deal with it according to the established rules of the court; and being of opinion that the allegations which constituted the equity of the bill were falsified by the affidavits on the other side, he should discharge so much of the Vice-Chancellor's order as was the subject of the appeal motion, and direct that the plaintiff should pay the costs of so much of the motion below, as had related to the part of the order which was so discharged.

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 1840.—Cotman v. Orton.
 

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His lordship, however, added, that he wished to guard himself against its being supposed that he would have allowed the Vice-Chancellor's order to stand, whatever might have been his opinion upon the effect of the affidavits; because the court ought not to interfere for the purpose of preventing a party from enforcing a legal claim, without securing to itself the means of putting him in the same position, in the event of his turning out to be right, as if the court had not interfered: whereas, by making a prospective order like [\*304] the present, the court could not determine what security it ought to require the plaintiff to give, as the condition of his obtaining the injunction, so as to enable the court to do justice to the defendant, in the event of the plaintiff's failing to make out his case at the hearing.[1]

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 COTMAN v. ORTON.
 

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1840: November 13, 14, 17.

*Semble*: Where it appears, at the hearing of a cause, that the effect of the plaintiff's having unnecessarily made a person a party defendant to the suit has been to deprive another defendant of his evidence on a material point, the court will not make a decree against such other defendant without first putting the matter into a course of inquiry, in which he may have the benefit of the evidence of which he has been so deprived.

A PERSON had been made a defendant in this cause, who, if competent, would have been a material witness for another defendant upon the issue raised by the pleadings.

At the hearing, the LORD CHANCELLOR, having expressed his opinion that the person so made a defendant was not a proper party to the suit, and, consequently, that the bill must be dismissed, as against him, with costs, said,

The effect of making this person a defendant has been to shut out his evidence for the principal defendant; and, under these circumstances, I could not make a decree for the plaintiff, without putting the parties in the same situation as if this person had not been made a defendant. I think it, however, far from improbable that I shall see enough upon the evidence, as it stands, to justify me in dismissing the bill at once, as against both the defendants. If I do not, I must, for the reason I have stated, put the matter in a course of further inquiry.

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On a subsequent day,

THE LORD CHANCELLOR said, he was of opinion that there was enough upon the evidence, as it stood, to warrant him in dismissing the bill, at once, as against both the defendants.

[1] See the two last cases.



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1841.—Loy v. Duckett.

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**\*MARTIN AUGUSTINE LOY v. SIR GEORGE DUCKETT, BART., [\*305]  
THOMAS HOVELL, AND CHARLES LANE.**

1841: June 29.

A party beneficially entitled to one-fourth of a fund belonging to the estate of a testator who had been dead 150 years, having obtained letters of administration *de bonis non* to the testator, filed a bill for an account and payment of the whole fund. It appearing that no part of the fund in question was required for the payment of the testator's debts, but that the beneficial interest in the other three-fourths had passed under the residuary bequest in his will, and had belonged successively to the estates of several persons who were named in the proceedings, but who were not represented on the record, the court ordered one-fourth only to be paid to the plaintiff, and the other three-fourths to be paid into court, with liberty to any party interested to apply, giving notice to the Attorney General.

In the year 1692, a company or society was established under the title of the West New Jersey Society, for the purpose of acquiring and stocking land in the colonies of British North America, and for trading and other purposes; the capital being divided into 1600 shares, which were, by the rules of the company, transmissible as personal estate. Shortly after its formation the company fell into embarrassments, and the shares in it became greatly depreciated. At length, about the middle of the last century, the affairs of the company were wound up, and its property realized for the purpose of distribution amongst the shareholders, the greater part of whom were paid their respective shares of the surplus; and the rest of the surplus, corresponding to about 770 shares, for which no claimants appeared, was invested in the names of the then president, vice-president, and treasurer of the company, in trust for the parties who should turn out to be entitled to them. From that time, although the company ceased to exist for its original purposes, it continued to be nominally kept on foot by the appointment of a president, vice-president, and treasurer, as vacancies in those offices occurred, and by the maintenance of a suitable establishment for the purpose of protecting and managing the unclaimed fund, and of apportioning it amongst the parties entitled, as \*they should severally come in and establish their [\*306] claims. Claims were accordingly from time to time brought in and adjudicated upon: so that at the time of the institution of this suit, seventy-seven shares only remained unclaimed, corresponding to which a sum of about 25,000*l.* 3 per cents. was standing in the joint names of the three defendants, who then respectively filled the offices of president, vice-president, and treasurer of the company. Of those seventy-seven shares, twenty were standing in the name of one Edward West, who had been an original shareholder in the company.

The plaintiff claimed the beneficial interest in one-fourth of those twenty shares under a long series of wills and intestacies, commencing with the will of one Edward West, a citizen of London, who died in the year 1695, having, by his will, bequeathed to his wife all his interest in stock and land in North

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1841.—Loy v. Duckett.

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America: and he also claimed to receive the entirety of the fund belonging to those twenty shares, as personal representative of the same Edward West.

The bill, which was filed in the year 1839, alleged that the testator Edward West was the same person as the Edward West the original proprietor of the twenty shares in question, and that that bequest in his will related to those shares: it also alleged that the testator's debts had been paid out of his general personal estate, and that no part of these shares had been required for that purpose; and, consequently, that Hannah West, his widow, by virtue of the bequest to her, became upon his death absolutely and beneficially entitled to the whole of the twenty shares. The bill then, after stating the situation of the fund, and the mode in which the plaintiff deduced his title, from Han-

nah West, to the beneficial interest in one-fourth part of it, alleged, [\*307] that \*he had obtained, from the Prerogative Court of Canterbury, the proper letters of administration to the unadministered goods of the several persons through whom that title was deduced, beginning at the end of the series and proceeding regularly upwards, in succession, to Edward West the original testator; and it prayed that it might be declared that the plaintiff was, under or by virtue of the several wills thereinbefore mentioned, and of the several letters of administration so granted to him or some or one of them, entitled to the twenty shares in question, and to a corresponding proportion of the fund; and that, if necessary, it might be referred to the master to take an account of or otherwise ascertain the amount of the fund and of the proportion of it attributable to those twenty shares, and that such proportion, when ascertained, might be transferred and paid to the plaintiff, as such administrator, or otherwise, as he should direct.

The defendants, by their answer, submitted to the court whether the plaintiff had made out the identity of the Edward West under whom he claimed with the Edward West the original proprietor of the shares, and whether he was or not entitled to those shares.

By the decree of the Vice-Chancellor it was referred to the master, amongst other things, to inquire whether Edward West, the original shareholder in the company, was the same person as Edward West, the testator under whom the plaintiff claimed, and if so, whether the plaintiff was entitled to all or any, and how many of such shares, or any and what part thereof, or to any and what interest therein.

The master, by his report, found that the Edward West, the testator, was the same person as the Edward West who held the twenty shares [\*308] in the West New Jersey \*Society; and that the above mentioned bequest in his will related to his interest in those shares. He then found that the will of Edward West was proved by one of the executors therein named, that the said shares were not required for the payment of the testator's debts, all of which were paid out of his general personal estate, and that Hannah West became beneficially and absolutely entitled to the said shares, although they had under the circumstances, remained unclaimed,

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1841. —Loy v. Duckett.

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and had not since the death of Edward West been specifically disposed of: that, being so entitled, Hannah West died in 1702, having made her will, whereby she gave all her real and personal estate to her sister Elizabeth Bromley, free from the control of her husband Nathaniel; and that her will was duly proved by Elizabeth Bromley, who died in May, 1714, intestate, leaving Nathaniel Bromley her husband surviving, who thereupon became beneficially entitled to the said twenty shares: that Nathaniel Bromley died in April, 1728, having made his will, whereby he gave all the residue of his estate to his wife Sarah Bromley, whom he appointed his executrix; and that she duly proved the will and became beneficially entitled to the said twenty shares: that Sarah Bromley died in October, 1729, having made her will, whereby she appointed Joseph Symons and Joseph Shove her executors, and gave all the residue of her estate to them equally; that they proved the will, and that Joseph Symons made his will, dated the 5th of February, 1736, whereby, he gave all the residue of his estate to his seven nieces, daughters of his sister Elizabeth Stone. That Joseph Shove died in October, 1742, having made his will, whereby he gave all his personal estate to his wife Susannah, and appointed her sole executrix: that Susannah Shove proved his will, and died in December, 1748, intestate; and that letters of administration to her estate were granted to Francis Hudson the husband and \*lawful attorney of Susannah Hudson her daughter; that [\*309] Susannah Hudson died in April, 1780, in the lifetime of her husband; and that Francis Hudson died in February, 1800, having made his will, whereby he gave all the residue of his estate to Richard Hudson, and appointed him sole executor: that Richard Hudson proved the will, and died in November, 1802, having made his will, whereby he gave all the residue of his estate to Elizabeth Hudson his wife, whom he appointed sole executrix: that Elizabeth Hudson proved that will, and died in February, 1804, having made her will, whereby she gave all the residue of her real and personal estate to her executors, in trust for Samuel and Mary Harding, her nephew and niece, as tenants in common, both of whom survived her; that her will was never proved in the Prerogative Court of Canterbury, or otherwise within that province; but that letters of administration of her estate had been granted by that court to the plaintiff; and that the plaintiff married the said Mary Harding, who died in September, 1829; and that on 23d of July, 1836, letters of administration to her estate were granted to the plaintiff by the Prerogative Court of Canterbury: and that on the 4th of July, 1838, letters of administration with the will annexed of the unadministered goods of Edward West the testator were granted by the same court to the plaintiff, as administrator, with will annexed, of the goods left unadministered of Hannah West deceased, whilst living, relict and residuary legatee named in the will of Edward West. And he found that the plaintiff, as administrator *de bonis non* of Edward West, and also of Hannah West, had shown a legal

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 1841.—*Loy v. Duckett*.
 

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title to the twenty shares, and a legal and equitable title to five of the said shares.(a)

[\*310] \*On the hearing of the cause for further directions before the Vice-Chancellor, his honor ordered that the defendants should be at liberty to retain, out of the proportion of the fund in their hands belonging to the twenty shares of Edward West, the amount of the costs of this suit, and other the costs, charges, and expenses properly incurred by them in relation to the matters in question, such costs to be taxed by the master as between solicitor and client; and that they should transfer what should remain to the plaintiff, as the legal personal representative of Edward West, with liberty to all the parties to apply, as there should be occasion.

The defendants appealed from that order, insisting that, inasmuch as the plaintiff had shown an equitable title to five only of the twenty shares, one-fourth part only of the fund attributable to the twenty shares ought to be transferred to him.

The appeal now came on to be heard.

Mr. *Girdlestone* and Mr. *Reynolds*, for the appellants.—Three-fourths of these shares are claimed by the plaintiff, solely as legal personal representative of Edward West, while his title to the beneficial interest in the other one-fourth proceeds on the assumption, that all the duties belonging to that character have been discharged, and that the whole beneficial interest in the fund passed to the residuary legatee. Under such circumstances, a legal personal representative is considered, in equity, as a trustee for the parties beneficially entitled, and, in the absence of those parties, the court will not

put the personal representative in possession of a fund, which, by [\*311] \*his own admission, belongs exclusively to them. *Ex parte Ram*.(b)

[THE LORD CHANCELLOR :—'There the question was, whether, under the act of parliament, the transfer should be made to the representative of the surviving trustee, or to the party beneficially entitled.]

In *Orrok v. Binney*.(c) where an executor sought to recover a sum belonging to his testator, it appearing that the debts were all paid, and that the fund was bequeathed to infants, the court would not allow the executor to receive it, but secured it in court for the benefit of the infants.

[THE LORD CHANCELLOR :—What do you ask in this case? that the three-fourths may be paid into court?]

The defendants do not object to that course, if your lordship thinks it right; but as no misconduct is imputed to the defendants, but on the contrary, it appears that they and their predecessors in office have been in the habit of advertising for claimants, and have already administered by far the greater part of the fund, originally entrusted to them, it is submitted that

(a) The report did not substantively find that the plaintiff had taken administration to Hannah West.

(b) 3 Mylne & Craig, 25.

(c) Jac. 523.

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 1841.—Loy v. Duckett.
 

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there is no ground for taking the administration of this portion of it out of their hands.

Mr. *Wakefield* and Mr. *Harwood*, for the plaintiff.—It is the common course for the legal personal representative of an owner of stock in a public company, when the company refuses to transfer the stock, to bring an action for it: and the action always succeeds, because a court of law looks only to the legal title. If \*that course had been adopted in this [\*312] case, the plaintiff would have recovered the whole fund, and this court could not have interfered to prevent him from receiving it. It is said, however, that where the party proceeds in this court the rule is different; but, in the case of *Parsons v. The Bank of England*,(a) Lord Eldon held, that the bank was not to look beyond the legal title, observing that a different rule would impose upon them the duty of looking to all the trusts of the will. *Ex parte Nicholl*(b) was to the same effect: it may be said that that case turned upon the provisions of the statute relating to unclaimed dividends, but Lord Eldon, in his judgment, does not advert to the statute, and therefore the decision may be taken as an authority for the general proposition now contended for. The question has since been carefully considered by Lord Brougham in *Gutteridge v. Stilwell*,(c) where the sum in question was standing to the separate account of a married woman who had died before her husband, and afterwards the husband had died without having administered to her estate. The petitioner had obtained letters of administration to the wife only, and Sir J. Leach thought his title was not complete without an administration to the husband also; but Lord Brougham reversed that decision, holding that it was impossible for the court to look beyond the admitted legal personal representative.

[THE LORD CHANCELLOR:—Sir J. Leach's view in that case is more correct than Lord Brougham's, because it would follow from Lord Brougham's, that even where an executor had assented to a legacy, he might still sue for the fund, out of which the legacy was to be paid, on the strength of his legal \*title, without making the legatee a party; which would, [\*313] in fact, be administering the fund in the absence of the owner.]

Lord Brougham's view, however, is in conformity with that of Lord King in *Jones v. Goodchild*.(d)

[THE LORD CHANCELLOR:—There is no statement in that case, that the legacy had been assented to: it all turns upon that.]

Mr. *Girdlestone* was proceeding to reply; but

THE LORD CHANCELLOR (without hearing him) said:—I really do not think I can support this decree, as it stands. It is trying the principle to the utmost. You have a fund a century and a half old, and the party suing claims the fund as the personal representative of Edward West, who died in

(a) 4 Ves. 665.

(b) Turn &amp; Russ. 119.

(c) 1 Mylne &amp; Keen, 486.

(d) 3 P. Wms. 32.



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 1841.—Loy v. Duckett.
 

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1695. However, it appears, from the report, that he derives his title to one-fourth of the property through Sarah, who died in 1729, and who, as it is stated in the report, left her property between two persons, Joseph Symons and Joseph Shove; and from that Joseph Shove the title to one-fourth of the whole is derived. Well, but Sarah could have had no title unless Nathaniel had, and Nathaniel could have had no title unless Elizabeth Bromley had, and Elizabeth Bromley derives her title from Hannah, the person under whose administration the plaintiff himself is now claiming. If, indeed, this property was part of the estate of Hannah, and never became the estate of Elizabeth, that might do; but if it never became the estate of Elizabeth,

if it never became the estate of Nathaniel, if it never became the estate of Sarah, if it never became the estate of those \*three persons, then the report must be wrong on the beneficial interest, because it is only on the ground of beneficial interest in these persons, under Hannah, that the title to the beneficial interest is traced.

Then the case comes to this: here is a person who claims as administrator *de bonis non* to a person dead a century and a half ago, suing in this court to recover this property. Well, that he may do; but I have it before me now that this property does not belong to the estate of the person to whom he has obtained administration: it did originally, and still the legal title is in the plaintiff as representing that party; and upon that legal title alone he comes here, passing over all those persons who, by the statement in the report, have successively obtained beneficial interests in this property at a period, of course, subsequent to the death of Edward West. I cannot think that the court is in the habit of handing over property, under these circumstances, to the person who has got the legal title. It is said, indeed, that the party has a right to bring an action at law, and that this court would have no authority to interfere. That is perfectly true, but it does not at all follow that, in this court, the party would obtain possession of the property, under those circumstances, in the absence of those who are beneficially entitled.

The case under the act of parliament with regard to unclaimed dividends does not apply: inasmuch as it turned upon the particular provisions of the statute; but here the plaintiff has stated in his bill, and it appears on the report, that all these shares from time to time became the property of the various persons who are stated on the record; and, in that state of things, the

court is asked to adjudicate the fund to him, merely because he is the legal hand to receive it, and the only person who can \*give a discharge to the company, without any regard to the persons beneficially entitled. It does not appear who those persons are; but that there are persons so entitled, is stated on the proceedings. I know nothing of any administrations but those which appear upon the report; nor can I take any notice of them. If the plaintiff had thought it important, he should have adduced evidence before the master to show how he connects himself with



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 1841.—Loy v. Duckett.
 

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those several persons. If there be no one claiming the beneficial interest in these estates, then the fund is the property of the Crown. If there is no person connected with Elizabeth, or Sarah, or Nathaniel, and the other persons stated to be entitled, the plaintiff, at all events, is not entitled. I think the order I must make, with a view to enable those persons to have the property who may be entitled, and to enable this plaintiff to have his share of it, will be to pay the one-fourth of the whole sum to him, the remainder to be paid into court, to be carried to the account of the shares of Edward West, with liberty to the parties to apply.

Mr. *Wakefield*.—I do not ask that it may be brought into court.

THE LORD CHANCELLOR :—But I order it to be brought into court.[1] The plaintiff has no right to have it, but the other parties will have a right to demand and to obtain it. And I think the Attorney General should have notice. The defendants will have their costs, charges, and expenses out of the fund, as provided by the Vice-Chancellor's order. The plaintiff's costs still remain to be provided for.

Mr. *Wakefield* then submitted that his client was entitled to costs, as between solicitor and client, and his charges, and expenses, including those of the \*administrations which he had obtained, out of the fund [\*316] belonging to the twenty shares.

Mr. *Girdlestone* said his clients had no interest in that question, and he should therefore not oppose the claim.

THE LORD CHANCELLOR :—The plaintiff is suing as the personal representative of the fund to which he is in part beneficially entitled. If he had received the whole fund, he would have had a right to pay himself all the costs, charges, and expenses properly incurred by him in recovering that fund. I retain a portion of it, because I find he has no interest in it; but that circumstance ought not to affect his right to costs as administrator.

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The order, as drawn up, was, in effect, that the whole fund which the master had found to belong to the twenty shares in question, should be transferred to the Accountant General, in trust in the cause; that out of the fund so transferred the plaintiff and defendants should be paid their respective costs of the suit, including the costs of the petition of appeal, as between solicitor and client; and also such costs, charges, and expenses as they should respectively appear to have properly incurred in relation to the matter in question; and that one-fourth of the residue of the fund which should remain after such payment, should then be transferred to the plaintiff, and the other three-fourths carried to an account, to be entitled "The account of the fifteen shares belonging to the estate of Edward West," with liberty to any

[1] There are cases in which the court may *proprio motu*, order a thing to be done without application of the party. "It is the duty of the court to give such direction whether it be asked for or not." Lord Cottenham, *Harman v. Jones*, ante, 301.

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 1840.—Thompson v. Griffin.
 

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person entitled to, or interested in, the fund which should be standing to that account, to apply ; but no part of such fund was to be transferred, sold, or otherwise disposed of, without notice to the Attorney General.

Reg. Lib. B. 1840, fol. 800.

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[\*317]

\*THOMPSON v. GRIFFIN.

1840 : November 18. 1841 : January 23.

*Semle* : Where, in a marriage settlement, the wife's property is settled upon herself for life, for her separate use, with remainder to her children, and a mere power is given to the trustees to apply the income of the property towards the maintenance and education of the children ; the father will not be entitled to require that any part of the income shall be applied to the maintenance of the children, so long as he is himself of ability to maintain them.

By indentures of lease and release and assignment, bearing date respectively the 16th and 17th of November, 1838, and made between George Thomas Thompson of the first part ; Amelia Griffin of the second part ; and Thomas William Griffin, and Henry Patten of the third part ; being the settlement made upon the marriage of G. T. Thompson with Amelia Griffin, after reciting, that Amelia Griffin was seised and possessed of certain freehold and leasehold estates, and that she was also entitled to a sum of 1500*l.* 3 per cent. annuities which had lately been transferred into the names of Thomas William Griffin and Henry Patten upon the trusts thereafter mentioned : it was witnessed that Amelia Griffin, with the consent of George Thomas Thompson, thereby conveyed and assured the freehold estates to Thomas William Griffin and Henry Patten and their heirs, to the use of herself, her heirs, and assigns, until the marriage, and from after the marriage, to the use of Thomas William Griffin and Henry Patten during her life upon trust for her separate use, and, after her death, to the use of the eldest or only son of the marriage, in fee, to be a vested interest in him ; but if there should not be any such son, or being such, if he should die under the age of twenty-one years, without leaving lawful issue living at the time of his death, then to the use of the daughter of the marriage, if only one, and if there should be more than one daughter, then to the use of all the daughters of the marriage, to be equally divided between them, with cross remainders in case

[\*318] of any dying before the age of twenty-one or marriage ; and in case there should not be any son or sons, daughter or daughters of the marriage, or if all of them should die under the age of twenty-one years, and neither of them should leave any issue living at his or her death, and Amelia Griffin should survive G. T. Thompson, then to the use of Amelia Griffin, her heirs and assigns for ever ; but if G. T. Thompson should survive Amelia Griffin, then to such uses as she should, by will, appoint ; and in default of such appointment, or, subject thereto, to certain uses therein mentioned.

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1840.—Thompson v. Griffin.

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And it was further witnessed, that Amelia Griffin, with the like consent, thereby assigned the leasehold estates to the same persons, in trust, after the marriage, for the separate use of herself, for life ; and, after her death, in trust for the child, if only one, or for all and every the children, if more than one, of the marriage, except an eldest or only son, equally to be divided amongst them, if more than one, as tenants in common, to be vested in sons at the age of twenty-one, and in daughters at that age or marriage, which should first happen. Then followed a clause, by which it was agreed and declared, that the trustees or trustee of the settlement for the time being should have power, after the decease of Amelia Griffin, to apply all or any part of the rents and profits of the freehold and leasehold estates, in, for, and towards the maintenance and education of the child or children presumptively entitled thereto by virtue of the limitations or trusts aforesaid, during his, her, or their minority or discoveriture, or respective minorities or discoveritures, and, if more than one, in proportion to their respective presumptive shares of the trust premises ; and if the whole of such income should not be so applied, then that the surplus unapplied income should be improved at interest, and go in augmentation of the share or respective shares from which the same should have arisen. But if \*there should be an only or an [\*319] only surviving child of the marriage, then the leasehold premises were to be held in trust for such only or only surviving child, absolutely ; and in case there should not be any child or children of the marriage, who, being a son or sons, should live to attain the age of twenty-one years, or, being a daughter or daughters, should live to attain that age or be married, and Amelia Griffin should survive G. T. Thompson, then the leasehold estates were to be held in trust for Amelia Griffin absolutely ; but in case G. T. Thompson should survive Amelia Griffin, then upon trust to sell a sufficient part to pay certain legacies, and subject thereto in trust for G. T. Thompson for his life, and after his death for such persons as Amelia Griffin should, by her will, appoint, and, in default of such appointment, or, subject thereto, upon certain, other trusts therein mentioned. And, lastly, it was declared that the trustees should stand possessed of the 1500*l.* 3 per cent. annuities upon the same trusts as were before mentioned with respect to the leasehold estates.(a)

The wife died in the month of September, 1839, having previously executed her power of appointment, as to the whole of the settled property, in favor of her husband, absolutely, and leaving an infant son, the plaintiff, who was the only issue of the marriage.

The bill, which was filed shortly after the wife's death, on behalf of the infant, against his father and other proper parties, prayed, amongst other things, that it might be referred to the master to inquire whether any and what sum ought to be allowed out of the \*income of the set- [\*320] tled property for the maintenance of the plaintiff.

(a) The reporters have been obliged to take this statement of the settlement from the pleadings in the cause, in consequence of the impossibility of procuring a copy of the deed.

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1840.—Thompson v. Griffin.

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The Master of the Rolls, by the decree in the cause made the reference conditionally only, upon the master's finding that the father was not of ability suitably to maintain the plaintiff.

The defendant, the father, appealed from that part of the decree, insisting that the reference ought to have been unconditional.

The appeal now came on to be heard.

Mr. *Richards* and Mr. *Dixon*, for the appellant, cited *Mundy v. Lord Howe*,<sup>(a)</sup> *Meacher v. Young*,<sup>(b)</sup> *Stocken v. Stocken*.<sup>(c)</sup>

Mr. *Rolt* appeared for the infant plaintiff in support of the decree.

Mr. *Richards*, in reply.

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1841: Jan. 23.—THE LORD CHANCELLOR:—I have not had the advantage of seeing any note of the judgment of the Master of the Rolls in this case, but I have no doubt, from a careful examination of the settlement, that it was right.

If the property of the children had been derived from the bounty of a stranger, there could be no doubt but that the father, being of ability [\*321] to maintain his children, \*could not be entitled to any allowance out of the income of their property for that purpose; but the claim of the father rests upon the distinction which has been taken between the cases in which the property of the children is derived from the bounty of a stranger, and those in which they are entitled to it under the marriage settlement of their parents, such as *Mundy v. Lord Howe*,<sup>(d)</sup> *Stocken v. Stocken*,<sup>(e)</sup> and *Meacher v. Young*.<sup>(g)</sup> It appears to me that the distinction between those two classes of cases has been carried quite as far as can be justified upon principle. In some of them it has been said that, in the case of marriage settlements, the father is a purchaser, and therefore entitled to an allowance for the maintenance of his children, and thereby to be relieved from the burden which the law throws upon him of maintaining them himself. No doubt, he is so, if the contract contained in the settlement gives him such a benefit; but, before he can be entitled to it, he must show that such was his contract. So in the case of a legacy from a stranger, if the intention, to be found in the construction of the will, appears to have been, that the father should have such a benefit, the court is bound to give it to him. In both cases, the question is one of construction and intention. In all the cases referred to, there were distinct and positive trusts to apply the income to the maintenance of the children, applicable, according to the construction put upon the whole of the provision, to the case of a surviving father.

If, in these cases, the construction was correct, the order for main-

(a) 4 B. C. C. 223.

(b) 2 M. & K. 490.

(c) 4 Sim. 152; 4 Mylne & Craig, 95.

(d) 4 B. C. C. 223.

(e) 4 Sim. 152, 2 Mylne & Keen, 489, and 4 Mylne & Craig, 95.

(g) 2 Mylne & Keen, 490.

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1841.—Thompson v. Griffin.

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tenance must have been so: for, if the \*settlement had expressed in terms [\*322] what the court thought it sufficiently expressed upon the construction of the whole of the provisions, there could be no doubt but that such a trust would be carried into effect. In the present case I find no such trust; I find, indeed, a power, and, in the case of the freehold property which is vested in the infant, a mere power, at the discretion of the trustees, to apply part of that income, which would otherwise belong to the infants, for the purposes of their maintenance and education. If they do not exercise that power, the whole income belongs to the children. The father contends that he, by the authority of this court, can compel them to exercise that power, for the purpose of giving the whole or part of this income to him. This would be going far beyond any of the other cases. I cannot, upon this settlement, find any trust for the benefit of the father, or any contract that he should be relieved, out of the settled property, from the burden of supporting his children.

This would have been my view of the case, if it were clear that the provision in the settlement as to maintenance applied to the case, which exists, of there being only one child; but that does not appear to me to be the true construction of the settlement. The freehold property is clearly vested in the plaintiff. Upon the death of the mother, the limitation is to the use of the eldest or only son and his heirs in fee. If there should be no son, the daughters were to take the freehold property between them, with survivorship between them if any died before twenty-one or marriage, and if none should attain that age or marry, with remainder over, which may explain the term "presumptive shares" in the power to maintain. Of the leaseholds, the trustees, after the death of the mother, were to stand possessed in trust for the child of the marriage, if only one; and \*after provid- [\*323] ing for the event of there being more than one, it is declared, that if there should be an only, or an only surviving child, then the said leasehold premises should be held in trust for such only, or only surviving child, absolutely. The stock was settled in the same manner. If, however, there were more children than one, the leaseholds and the stock were to be held in trust for all except the eldest son, to be vested in such of them as being sons should attain twenty-one, or being daughters should attain that age or marry. And then immediately follows the provision for maintenance, being a power for the trustees, after the death of the mother, to apply all or any part of the rents, from the freehold and leasehold property, for or towards the maintenance and education of the child or children presumptively entitled thereto during his or her minority or coverture; and if more than one, in proportion to their respective presumptive shares of the said trust premises; and if the whole should not be so applied, the surplus unapplied income was to be improved at interest, and go in augmentation of the share or respective shares from which the same should have arisen; but if there should be an only or an only surviving child, then the said leasehold premises should be held in trust for such only or only surviving child, absolutely. The power, therefore, applies

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only to presumptive shares, which could exist only in the event of there being more children than one, and as, there being only one child, all his interests are vested, though subject, as to the personalty, to be divested by death under twenty-one, the provision as to maintenance does not seem to apply to his case; and there is an obvious reason for not including the case of an only son in the provision for maintenance, because, as all the income of the vested property would belong to such eldest son, there could be no difficulty in applying it for his maintenance and education if it [\*324] \*should be required; but as to the shares of the younger children, as they were contingent, and the income as well as the capital might by their deaths before the periods of vesting, become the property of others, there was an obvious reason for giving a power to apply the income, if necessary, for the maintenance of such children.

This construction of the settlement deprives the father of the only grounds upon which his claim was attempted to be supported.

The appeal must be dismissed with costs.[1]

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[\*325] \**Between* HENRY BILLINGTON WHITWORTH AND ROBERT WHITWORTH, Plaintiffs, and PHILIP AUGUSTUS GAUGAIN, JOSEPH MAYOR, AND GEORGE PELL, Defendants.

1841: May 31; June 1.

The bill, stating the title of the plaintiffs as equitable mortgagees by deposit of deeds, and that certain persons represented by the defendants had got possession of the mortgaged estates under *elegits* sued out by them in concert with the mortgagor, upon judgments obtained subsequently to the date of the equitable mortgage, in the names of those parties, but at the instance of the mortgagor, and for fictitious debts, prayed that the plaintiffs might be declared entitled as equitable mortgagees to priority over the *elegits* and the judgments so obtained, and that such judgments and *elegits* might be declared fraudulent and void as against the plaintiffs, and that the mortgage security might be realized, and the proceeds paid to the plaintiffs towards satisfaction of their debt, and that a receiver might, in the mean time, be appointed, and the defendants restrained from receiving the rents of the mortgaged premises, and also from permitting the mortgagor to receive them. An order for a receiver, which had been made by the Vice-Chancellor, was discharged, upon appeal, by the Lord Chancellor, his lordship being of opinion that the charges of fraud and collusion were not made out against the parties who had obtained possession under the *elegits*, and that the question whether the plaintiffs were entitled to priority over the defendants, independently of these charges, was not open to them in the present state of the record, inasmuch as it was clear, from the frame of the bill, that the claim of the plaintiffs did not profess to be founded upon any such ground.

Whether a court of equity will interfere in favor of an equitable mortgagee against a tenant by *elect*, who has got possession of the land without notice of the mortgage, under a judgment obtained against the mortgagor subsequently to the mortgage; *Quære?*

THE bill in this cause stated that the plaintiffs were bankers at Northampton, and that George Cooke was a solicitor in the same town, to whom the

[1] *Kekewich v. Langston*, 11 Sim. 291; 4 Myl. & Cr. 100, n. 2.



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1841.—Whitworth v. Gaugain.

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plaintiffs had, for some time previous to the month of April, 1839, been in the habit of making advances of money, partly upon his personal security, and partly upon the security of promissory notes, in which he was jointly and severally liable with one Edward Lewis Mayor, the defendant George Pell, and other persons: that on the 22d of April, 1839, the plaintiffs to whom Cooke was then indebted in the sum of 3000*l.*, advanced to him, at his request, a further sum of about the same amount, \*upon [\*326] which occasion he deposited with them the title deeds of certain property belonging to him, situate in the several parishes of Kingsthorpe and St. Sepulchre, in Northampton; and that he at the same time signed and delivered to them a memorandum of that date, which stated that the deeds had been deposited with them as a pledge, to secure to them or the survivor of them, or any future partner or partners in their banking establishment, the re-payment of all and every sum and sums of money which they or any such other persons had already or should thereafter at any time or times pay or advance to Cooke, or become in any manner liable for on his account, with interest for the same at five per cent. per annum; and Cooke thereby engaged, if required, to execute a legal mortgage or other security of the premises to the plaintiffs, free from all expense.

The bill then stated that the deeds so deposited had ever since remained and then were in the hands of the plaintiffs; and that they had frequently applied to Cooke to pay what was due to them upon that security, or to execute a legal mortgage of the premises comprised in it; and that, in and previously to the month of November last, he had promised to execute such mortgage, but that, under various subterfuges, he had avoided the performance of his promise; and that the plaintiffs had, therefore, in and previously to the 16th of November, 1840, caused urgent applications to be made to Edward Lewis Mayor for payment of a certain promissory note for 540*l.*, for which he and another person were jointly and severally liable with Cooke; and that on the 26th of November, 1840, they had commenced two actions, one against those parties upon that note, and the other against Cooke and George Pell and other parties upon another note for 380*l.*, both of which actions were defended, so that the trials did not come \*on un- [\*327] til after the expiration of the following Hilary term, when the plaintiffs obtained verdicts in both, for the whole amounts claimed, and costs.

The bill then proceeded to state, that in or about the middle of the same month of November, 1840, and after the above mentioned actions had been threatened on the part of the plaintiffs, and with the view of defrauding the plaintiffs and of obtaining priority over and defeating their equitable lien upon the premises in question, Cooke contrived, in concert with Edward Lewis Mayor, who was his father-in-law, and Pell, who was his intimate friend, that certain actions and proceedings should be commenced against him and carried on in the manner after mentioned: that, accordingly, on the 16th of that month an action was commenced in the name of E. L. Mayor against Cooke

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for the recovery of an alleged debt of 957*l.* 16*s.* 4*d.*, and on the same day another action was commenced in the name of Pell against Cooke, for the recovery of an alleged debt of 414*l.* 16*s.* 7*d.*: that both of those actions were commenced at the instance of Cooke, and were carried on and conducted by his secret intervention and advice, although he, or E. L. Mayor or Pell at his instance, obtained other attorneys to act in his name in the prosecution of them, for the purpose of giving a color of fairness to the proceedings: that Cooke was, in fact, the professional adviser of Mayor and Pell in the actions commenced against them as before mentioned by the plaintiffs and that Messrs. Vincent and Sherwood, who were the London agents of Cooke, conducted the defences to those actions as the agents of Cooke.

The bill then stated, that Cooke made no defence to either of the actions so brought against him in the names of Mayor and Pell, and that on [\*328] the 28th of November, \*1840, he signed two several cognovits in those actions, for the respective sums claimed therein, and costs, which sums were made payable on the 1st of December following, but that they were not, in fact, paid on that day, nor were they *bona fide* demanded by Mayor or Pell, or, if any demand was made for them, such demand was merely colorable; and that, on the 2d of December, judgments were signed in both of those actions, for the sums untruly acknowledged by the cognovits to be due: that by virtue of those judgments two writs of *elegit* were sued out by Mayor and Pell respectively, the first being tested on the 19th of December, and the second on the 21st of December, and warrants to execute both of such writs were received by the sheriff's officers on the 28th of the same month, on which day legal seisin of the premises in the parish of Kingsthorpe was delivered to E. L. Mayor, and of the premises in the parish of St. Sepulchre, to Pell; and that, on the following day, Pell, accompanied by one John Jones, who had long acted as the managing and confidential clerk of Cooke, and was well known to Cooke's tenants in that character, called upon the tenants of the premises in question, situated in the parish of St. Sepulchre, and, in the presence of Jones, requested them to acknowledge him (Pell) as their landlord; and that the tenants, understanding and believing, from the circumstance of Pell being accompanied by Jones, that such was the wish of Cooke, accordingly attorned to Pell, who thereupon left orders for them to pay their rents in future to him: that having procured the attornment of the tenants in the parish of St. Sepulchre, Pell then, in company with Jones, called upon the tenant of the premises in question in the parish of Kingsthorpe, and requested him to sign a declaration of attornment to E. L.

Mayor, at the same time intimating that if he refused to do so, the [\*329] sheriff's officer would take possession of the \*premises under the *elegit*; that under the influence of that statement, and concluding from the circumstance of Pell being attended by Jones that it was the wish of Cooke that he should comply, he executed the declaration of attornment

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which was tendered to him for signature, and which was in the hand-writing of Cooke himself.

The bill then stated that Cooke and E. L. Mayor had become bankrupts, and that the defendants Gaugain and Joseph Mayor respectively had been appointed as their assignees; and it charged that the plaintiffs were entitled to priority, in respect of the equitable mortgage, over the *elegits* of E. L. Mayor and Pell, and that those *elegits* were invalid and void as against the plaintiffs, and that the judgments upon which such *elegits* were obtained were suffered fraudulently and without consideration, and with the view unjustly to deprive the plaintiffs of the benefit of their security; and that the proceedings upon which the judgments were founded had been instituted in pursuance of a fraud concerted between Cooke and E. L. Mayor and Pell, and with a view that Pell and Mayor might hold the premises comprised in the plaintiffs' security in trust for George Cooke or some part of his family, or for the joint benefit of him, E. L. Mayor, and Pell. That general charge was followed up by a number of particular charges, to the same effect.

The bill prayed an account of what was due to the plaintiffs from Cooke, and a declaration that they were entitled, as equitable mortgagees of the premises in question, to priority over the *elegits* and judgments which had been obtained as aforesaid in the names of E. L. Mayor and Pell; and that such judgments and *elegits* were fraudulent and void as against the plaintiffs, \*as such equitable mortgagees: and it then prayed a sale of the [\*330] premises, and payment of the proceeds to the plaintiffs, and that if the proceeds should be insufficient to satisfy the plaintiffs' demand, they might be at liberty to prove for the deficiency under Cooke's bankruptcy; and that, in the meantime, a receiver might be appointed, and the defendants restrained from receiving the rents of the premises comprised in the plaintiffs' security, and also from permitting Cooke to receive such rents.

Before any answer had been put in, the plaintiffs moved, before the Vice-Chancellor, for a receiver, and supported the motion by affidavits verifying the above mentioned statements of the bill. In opposition to that motion, affidavits were made by E. L. Mayor and Cooke, as well as by Pell and the other defendants, which stated that the sums for which E. L. Mayor's and Pell's actions had been brought were debts *bona fide* due to them from Cooke, and for payment of which they had made frequent applications to him for several months before those actions were commenced. The rest of the statements in the bill relative to those actions were, for the most part, uncontroverted; but the charges of fraud and collusion, which were founded upon them, were positively denied. Notice, however, as distinguished from fraud, was neither expressly charged on the one side, nor denied on the other.

The Vice-Chancellor having granted the motion, the defendant Joseph Mayor now moved, by way of appeal, before the Lord Chancellor, to discharge his honor's order, having in the meantime filed a further affidavit, in

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which notice, on the part of E. L. Mayor, of the plaintiffs' title, at the time he obtained possession under the *elegit*, was expressly denied.

[\*331] \*Mr. *Wigram*, Mr. *Turner*, and Mr. *F. J. Hall*, for the appeal motion, said, that the ground upon which the order of the Vice-Chancellor had proceeded was, that although the defendant had denied fraud and collusion, he had not denied notice of the plaintiffs' title at the time he obtained possession under the *elegit*; and, as that ground was displaced by the subsequent affidavit which had been filed, they submitted that the order for a receiver ought to be discharged. *Plumb v. Fluitt*,(a) *Metcalf v. The Archbishop of York*.(b)

Mr. *Richards* and Mr. *Whitworth*, *contra*, contended that the circumstantial evidence of fraud which was afforded by the intimate relation subsisting between E. L. Mayor and Pell, and Cooke, and by the coincidence, in point of date, of their respective proceedings against him, which were stated in the bill and not denied, was sufficient to destroy the credit which might otherwise have been due to their denial of a fraudulent purpose. But, even supposing that there had been no collusion, and that the debts for which they had sued were not fictitious, it was material to observe the mode in which they had obtained possession of the land: they had not obtained it in the ordinary way by delivery from the sheriff's officers, but by voluntary attornment on the part of the tenants at the instance of Cooke himself: they therefore took the land subject to all the equities which affected it in the hands of Cooke.

Independently, however, of these peculiarities in the case, they contended that the Vice-Chancellor's order was right, upon the general ground, that an equitable mortgage had priority over a title by *elegit* under a  
[\*332] \*judgment subsequent to the mortgage, although such title was obtained without notice of the mortgage. It had been repeatedly laid down, that a judgment creditor did not stand on the footing of a purchaser, because he did not lend his money upon the security of the land, but looked primarily to the personal security of the debtor; *Finch v. The Earl of Winchelsea*,(c) *Brace v. The Duchess of Marlborough* (d) *Burgh v. Francis*,(e) *Casberd v. The Attorney General*,(g) *Averall v. Wade*.(h)

Mr. *Wigram* in reply.—The case which has now been argued is not the case made by the bill; which is, that the *cognovits* were given without consideration, and that the judgments are invalid and void. Upon that case being displaced by the affidavits, it was said that though we had denied collusion we had not denied notice; and, now that notice is denied, the plaintiff shifts his ground again, and sets up a new case which is not to be found upon the pleadings, and with reference to which he says it is immaterial

(a) 2 Anstr. 432.

(b) 2 Mylne &amp; Craig, 547.

(c) 1 P. Wms 277.

(d) 2 P. Wms. 490.

(e) 3 Swanst. 536, n.

(g) 6 Price, 411.

(h) 1 Lloyd &amp; Goold, 252. See p. 262.

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whether we had notice or not. If, however, it were competent for him to avail himself of such a point in the present state of the record, the answer to it would be found in the well known principle, that a court of equity will not interfere to the prejudice of a defendant who has got a legal estate for valuable consideration without notice of the plaintiff's equity. It cannot be disputed that if the defendants, or those whom they represent, had taken a legal mortgage without notice, they would have defeated the title of the plaintiffs. Are they to be in a worse position because they have obtained a legal interest in the property by process of law, instead of by \*conveyance from the bankrupt? If the defendants have actually got [\*333] the estate in satisfaction of their *bona fide* debt, it signifies not whether they originally advanced their money upon the security of it or not; the court will not take it from them. If the case of a judgment creditor were an exception to the general rule, the question of notice in *Metcalf v. The Archbishop of York* would have been superfluous.

June 2.—THE LORD CHANCELLOR:—The plaintiffs' case, as made by the bill and the affidavits, is simply this: that having had dealings with a person of the name of Cooke, and a debt having become due from Cooke to them, Cooke deposited certain title deeds with them under a written agreement, constituting, undoubtedly, as between themselves and Cooke, an equitable mortgage. They then say that a fraudulent combination was formed between Cooke, Edward Lewis Mayor, and Pell, for the purpose of depriving them of the benefit of their equitable mortgage, and that although there was no consideration, no debt due from Cooke to those parties, they agreed that actions should be brought and judgments confessed, and *elegits* issued, so as to put those parties in possession of the premises comprised in the equitable mortgage. The bill then contains a variety of allegations for the purpose of making out this case of fraud, assuming, from the beginning to the end, that the defendants have no title to hold the premises under this arrangement between Cooke and themselves, to the prejudice of the plaintiffs; and it prays that these judgments and *elegits* may be declared fraudulent and void, and that the plaintiffs may have the benefit of their equitable mortgage. The case so stated is supported by the plaintiffs' affidavit, and by the affidavits \*of several other persons who speak to detached parts of the [\*334] case. There is no allegation in the bill, or in the affidavits, that I have been able to find, of E. L. Mayor or Pell having had notice of the plaintiffs' demand; nor is that much to be wondered at, because the whole state of the case as represented by the bill and the affidavits of the plaintiffs, if true, would necessarily assume notice. The facts, so far as they are stated in the bill for the purpose of constituting a case of fraud, are denied by the affidavits in answer. No doubt, there are circumstances which are matter of observation, at least, in the mode in which E. L. Mayor and Pell obtained these *elegits*. There seems to have been a very intimate con-



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nection between them and Cooke, and very great facilities appear to have been afforded to them for obtaining the *elegits*; but whatever fraud Cooke, may have intended against the plaintiffs, the question is, whether these defendants, who are now tenants by the *elegits*, are or are not implicated in this fraud; because, if they have got that sort of interest in the land which enables them to maintain their title to it against as the plaintiffs, it is not material whether Cooke gave them that benefit with a fraudulent intention as against the plaintiffs or not; the question is, whether they are participators in that fraud, so as to affect the security they have got. That they positively deny, and I do not think upon the affidavits, much doubt remains but that they were *bona fide* creditors of Cooke. Cooke may have intended to give them a benefit, and to secure their debts in preference to others; and it may, in the further progress of the cause, turn out that there has been that degree of fraudulent understanding between Cooke and themselves which would invalidate their title as against the plaintiffs; but these affidavits negative all such allegations of fraud, so far as concerns them.

[\*335] "It appears that when the motion was made before the Vice-Chancellor, it was argued in the manner in which one would naturally expect it would be, namely, upon the case made by the bill and the affidavits; and, according to the representation made to me of the ground upon which his honor put his order, he went upon this, that the defendants had not denied that they knew of the plaintiffs' equity. If they knew of the plaintiffs' equity, undoubtedly they could not avail themselves of their legal title to the prejudice of that equity. But it seems difficult to understand how a denial could be expected of that which was not clearly charged, and which, in fact, according to the shape and form in which the plaintiffs brought on their case, did not constitute part of their case.[1] They put their case much higher. It is not, "You are not entitled to your legal right of possession because you had notice of our equity;" but, "Your legal interest is altogether compounded of fraud; it is manufactured for the purpose of depriving us, the plaintiffs, of our equity, and consequently, of course, you cannot hold as against us." In that view of the case, even if there had not been the additional affidavit with which I have now been furnished, I should not have thought the absence of such an affidavit a sufficient ground for the order which has been pronounced.

I have now, however, an affidavit to supply that which the Vice-Chancellor thought necessary for the defendants' case. I have an affidavit (whether it is true or false I have not the means of ascertaining, but I am bound to give credit to it, there being nothing against which it is to be balanced,) in which there is a positive denial of any knowledge or notice of the plaintiffs' equity at the time when the legal right to hold possession was

[1] But see *Gallatien v. Cunningham*, on appeal, 8 Cow. 361; affirming 8 C. Hopk. 48; *Denning v. Smith*, 3 Johns. Ch. Rep. 345; *Woodruff v. Cook*, 2 Edw. Ch. Rep. 259.



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\*obtained by virtue of this *elegit*. Looking, therefore, to the case [\*336] made by the bill, which prays that the *elegits* and the proceedings which led to them may be declared fraudulent and void, I am bound to say that, as the evidence now stands, that case is not so made out as to justify the court in interfering with the defendants' legal title.

In the argument, however, at the bar, a totally different turn was given, or attempted to be given, to the plaintiffs' case. It was attempted to be said that, independently of the question of fraud, the plaintiffs had, by law, a preferable title to the defendants. Now, if that be so, it is quite immaterial to the plaintiffs whether the *elegits* were fraudulent or not. In short, it would be a hopeless piece of fraud to manufacture that which, when manufactured, would have no effect against the plaintiffs' equity. It is clear, therefore, that that is not the ground on which the bill was filed. It is quite sufficient for the present purpose to say, that that is not the case made. It is not made upon the pleadings; it was not made in argument before the Vice-Chancellor and is suggested, for the first time, when it comes to be argued before me. I therefore abstain from going further into that question than to say, that if the bill had been framed with that view, and the claim of the plaintiffs founded on that supposed equity, I should have required a great deal more to satisfy me of the validity of that equity before I could have interposed by interlocutory order; because I find these defendants in possession of a legal title, although not to all intents and purposes an estate, yet a right and interest in the land which, under the authority of an act of parliament, they had a right to hold, the *elegit* being the creature of the act of parliament; and therefore they \*have a parliamentary title to hold the land [\*337] as against all persons, unless an equitable case can be made out to induce this court to interfere.

I was a good deal struck, at the time it was quoted, with the case of *Casberd v. The Attorney General*, decided in the Exchequer, by a high authority, and, evidently, after very considerable pains taken to ascertain the state of the law on the subject: but I was very much relieved when I read that case, because I observe the Chief Baron puts it entirely upon this—that it was not a contest between a legal title and an equitable claim; but that there was no legal title. When that case, therefore, comes to be examined, it is not only no authority for the argument of the plaintiffs, but it seems that if there had been a legal title, against which the claim of the equitable mortgagee was contending, that legal title would have prevailed.(a)

However, I do not enter further into that question than to explain what I conceive to be the result of the case of *Casberd v. The Attorney General*.

(a) It must be observed, however, that in *Casberd v. The Attorney General*, the party claiming under the extent in that case was the Crown, against which this court cannot, generally speaking, enforce a trust. See the Lord Chief Baron's observations on this point, 6 Price, 463.

On the general question of priority, as between an equitable mortgagee and a tenant by *elegit* under a judgment subsequent to the mortgage, see Gilb. For. Rom. p. 228; Gilb. Rep. pp. 14, 15.

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It is quite sufficient, for the present purpose, that the plaintiffs have failed in making out the case on which they ask for the interference of the court. And I am, therefore, of opinion the Vice-Chancellor's order must be discharged.(a)[1]

(a) The stat. 1 & 2 Vict. c. 110, s. 13, was not expressly referred to, either in the argument or in the judgment.

[1] The opinion of Lord Cottenham in the above case has not been considered a decision in favor of a preference of the legal, over the equitable title. O'Loughlen, M. R. in *Blunden v. Deart*, Flan. & Kel. 585. In *Langton v. Horton*, 2 Hare, 561, Wigram, V. C. says; "I think that in *Whitworth v. Gaugain*, Lord Cottenham intended only that which his words literally express, that he would not interfere against the judgment creditor by an interlocutory order, unless he was well satisfied of the validity of the equity to which he was called upon to give summary effect; and not that a judgment creditor, who has not contracted with specific reference to the property, can overreach a purchaser or incumbrancer who has acquired an interest in the property by contract specifically binding that property. The question in all such cases, I conceive, must be, who has the better right in equity to call for the legal estate, or the legal possession, and I have always understood the rule to be, that if the equitable owner or incumbrancer has done enough to perfect his equitable title, he has that better right." The hearing of the case of *Whitworth v. Gaugain* came on in March and April, 1844, before Vice-Chancellor Wigram, who decided the question of priority in favor of the equitable mortgagee. 3 Hare, 416. The Vice-Chancellor says: "To explain the legal effect of this transaction as between the plaintiffs, the mortgagees, and Cooke the mortgagor, I shall content myself with quoting the words of the Lord Chancellor of Ireland, in *Rolleston v. Morton*, 1 Dr. & War. 195, 'If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them; and a court of equity will execute the charge.' No one, I apprehend, could seriously contend that the memorandum in writing above set forth had not the effect of charging the property as between the mortgagees and the mortgagor. It created as perfect an equitable charge as intention and act can possibly create.—The question between them [the mortgagees and judgment creditors] is, which of the two is in equity to be preferred to the other? In considering that question I shall here repeat what I have on more than one occasion already said respecting Lord Cottenham's judgment when this case was before him upon motion, namely, that I am satisfied he did not intend by what he said, finally to decide the point now before me. However strong the leaning of his mind may have been in favor of the judgment creditor, he not only did not intend to decide, but intended that it should be reserved. And I therefore consider myself not only at liberty, but bound to decide the cause according to my own understanding of the law. Now, if the question be not decided by that judgment, I have certainly a very strong opinion upon it. The more I consider the case, the more satisfied I feel that I stated the general principle correctly in *Langton v. Horton*, (1 Hare, 549,) where I said that a creditor might under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it. First, take the case of an ordinary trust. It would not for a moment be contended that this court would not protect the interest of the *cestui que trust* against the judgment creditor of the trustee. The judgment of Lord Cottenham in *Newlands v. Paynter*, (4 Myl. & Cr. 408,) is decisive upon that point, and the other cases cited at the bar prove the same thing. Secondly, take the case of a purchaser for value before conveyance. *Lodge v. Lyseley*, (4 Sim. 70,) is an authority, if authority could be wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment creditor of the vendor. Again, take the case of an equitable charge to pay debts, or legacies, or any other equitable interest, except that of an equitable mortgagee, and I apprehend the right of the equitable incumbrancer to be preferred to the judgment creditor of the debtor, in whom the legal estate in the property charged might be, will be, as indeed it properly was, admitted. And if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case.

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 1841.—In re Bridge.
 

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\*In consequence of this judgment, the plaintiffs amended the bill, [\*338] and inserted a prayer for alternative relief, independently of fraud or collusion; and, having done so, they renewed the motion for a receiver before the Lord Chancellor.

No argument, however, took place, the defendants, upon the opening of the case, consenting to the appointment of a receiver.

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In the Matter of JOHN BRIDGE, a Person found to be of unsound Mind.

1841: July 19; Aug. 11.

Leave to traverse an inquisition of lunacy, if applied for by the party himself, who has been found a lunatic, is matter of right.

But, *semble*, The allowance of a sum of money out of the estate of the party so found lunatic, towards defraying the expense of the traverse, is subject to the Lord Chancellor's discretion.

A COMMISSION, in the nature of a *writ de lunatico inquirendo*, having issued to inquire of the lunacy of John Bridge, an inquisition was taken in the month of June, 1841, by which it was found that he was a person of unsound mind, so that he was not sufficient for the government, &c. Three of the jurymen, however, dissented from the verdict.

After the return of the inquisition, the usual order was obtained for a re-

of *Williams v. Craddock*, (4 Sim. 316,) the counsel, as well as the court, were of opinion, that an interest by way of equitable mortgage was entitled in this court to the same protection against judgments as other equitable claimants.—In what respect is the interest of the equitable mortgagee imperfect? As between the mortgagor and mortgagee it is absolute and complete. In what respect is it imperfect as between the mortgagee and those who claim under the mortgagee, as his creditors by judgment? The interest of the equitable mortgagee is liable to be defeated by a fraudulent dealing with the legal estate, and in that respect, no doubt, it is imperfect. But that is an infirmity to which all equitable interests are subject; and if other equitable interests are to be protected against judgments obtained against the trustee, or other party in whom the legal estate may be, why is the interest of the equitable mortgagee to be unprotected? The debt was no more contracted upon the view of the land (if that were material, which I think it is not) in the one case than in the other.—The most plausible way of stating the case in favor of the judgment creditor is by supposing his right to be founded in contract, and not to be the result of a proceeding *in invitum*; and this no doubt may be the truth of the case, when the judgment is voluntarily confessed. But admitting that view to be correct, how does it alter the case? The question remains—what was the contract? It was a general contract for a judgment, and the fruits of a judgment; and the original question, therefore,—what right does a judgment confer?—remains wholly untouched by the concession. If a party contracts specifically for a given property, pays the purchase money, and obtains the legal title, without notice up to the time of obtaining the conveyance, as well as of paying his money, that may give him a right to be preferred to an equitable claim which is prior in point of time. But there is no principle upon which a court of justice can be required to imply that a general contract to give a judgment is a contract to give that which does not belong to the debtor. If the trustee were to confess a judgment, am I to imply that it amounts to a specific contract to give the creditor an interest in that which belongs to the *cestui que trust*? That appears to me to be the true distinction. In one case the party contracts for a specific thing,—in the other he merely takes a judgment, that gives him nothing more than a right to that which belongs to his debtor." *Ibid.* 424, *et seq.*

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ference to the master to appoint committees; and a sum of 1300*l.*, which was in the hands of a Mr. Asals, with whom the lunatic had lodged, and which constituted nearly the whole of his property, except a pension of 160*l.* per annum, to which he was entitled for his life, from the board of customs, was brought into court.

Pending the proceedings under that reference, a petition was pre-  
[\*339] sented, in the name of the lunatic, praying \*that he might be at liberty to traverse the inquisition, and that all further proceedings under the commission might, in the mean time, be stayed.

The petition being opposed by the nephew of the lunatic, who had sued out the commission, affidavits were filed, on the one side and on the other, embodying the evidence taken before the inquisition, from which it appeared that the lunatic had, for some time, labored under various delusions respecting a supposed sum of 200,000*l.*, which he imagined had been left to him by a person named Long, and to be then standing in his own name in the Bank of England, where he conceived that some of the cashiers were in a conspiracy to defraud him of it. It further appeared, from the same evidence, that, in consequence of his repeated applications at the bank for the money, and his violent behavior to some of the officers when he was informed that there was no such sum belonging to him orders had been given to refuse him admittance; and that, having accordingly been on the next occasion, stopped at the door of the bank, he had committed a violent assault with a sword-stick, upon the porter for which he was taken into custody. It appeared, however, that upon all other subjects he was rational and inoffensive; and that notwithstanding his delusions respecting the sum of money, his expenditure was economical, and adapted to the means which he really possessed.

It further appeared, from the affidavits, that upon his being taken into custody and threatened with an indictment for his assault at the bank, he had been released on the ground of insanity, through the interposition of Mr. Asals, who undertook to place him in a lunatic asylum, and to pay a sum of

200*l.* to the bank in case he should be liberated and should thereaf-  
[\*340] ter commit any breach \*of the peace towards any of their officers.

It appeared that, in pursuance of that undertaking, Mr. Asals had placed him in an asylum near London, where he had remained nine weeks; but that, in consequence of the irritation occasioned by his confinement, he had, by the advice of his medical attendant and with the consent of the officers of the bank, been removed, about the time of taking the inquisition, to the house of a relation of Mr. Asals at Bethnal Green, where he had ever since resided, under the care of a keeper. It further appeared that, shortly after he had been placed in the asylum, Luke Bridge the younger, his nephew, who afterwards sued out the commission, had applied to Mr. Asals, and demanded to have the custody of the lunatic's person and property delivered to him; but that Mr. Asals refused to comply with that demand, alleging his liability to the bank for the custody of the lunatic's person, and his responsi-

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bility to the lunatic himself, in the event of his recovering, for the safe keeping of his property. It also appeared that Mr. Asals had taken an active part in opposing the commission, and the proceedings under it, on behalf of John Bridge: but it was distinctly stated, in the affidavits, that the present application was made at the spontaneous desire of John Bridge, and in pursuance of his own personal instructions to his solicitor; and that Mr. Asals had taken no part in it, either directly or indirectly.

The petition now came on to be heard.

Mr. *Rogers* and Mr. *Kyle*, in support of the petition, argued that the traverse was matter of right, under the stat. 2 & 3 Ed. 6, c. 8, s. 6; *Ex parte Ferne*, (a) *Ex parte Ward*; (b) and that the subsequent stat. of 6 G. 4, c. 53, \*had not affected that right, otherwise than by prescribing [\*341] a certain time within which the petition for leave to traverse should be presented, and by empowering the Lord Chancellor, in lunacy, to limit the time within which the traverse was to be tried.

Mr. *Wakefield* and Mr. *Romilly*, *contra*, contended, that the traverse of an inquisition was a matter for the Lord Chancellor's discretion; and that in the present case, the unsoundness of mind of the party was so fully established by the evidence, that leave to traverse ought not to be granted. In support of that proposition, they argued that the right supposed to be given by the stat. of Ed. 6, was conditional only, and not absolute, the language of the statute being, "if any person should be untruly found lunatic," and that the question whether the finding were untrue or not, or, at least, whether there were sufficient grounds for disputing it, was a matter for the Lord Chancellor's discretion, upon application being made to him for leave to traverse the inquisition. That was evidently the view taken of it by Lord Hardwicke in *Ex parte Roberts*, (c) and *Ex parte Barnsley*; (d) and by Lord Thurlow in *Ex parte Fust*, (e) and the practice of applying for leave was itself confirmatory of that doctrine, for if the traverse were matter of right, where was the necessity of coming to the Lord Chancellor for leave? If the Lord Chancellor had no discretion upon such applications, it would be easy for artful and designing persons to make a lunatic say he was dissatisfied with the verdict, and induce him to waste his property in contesting a fact about which no reasonable doubt could be entertained. In the present case, the family of the party were \*unanimous in favor of suing [\*342] out the commission; and all the opposition to it had proceeded from a stranger, at whose instigation there was great reason for believing that the present proceedings had been taken.

They also cited the case of *Saumarez*, (g) from an entry in the lunacy office,

(a) 5 Ves. 832.

(b) Ves. 579.

(c) 3 Atk. 5, and 308.

(d) Ib. 184.

(e) 1 Cox. 418

(g) The entry of that case is as follows:—

1823: *Ex parte Saumarez*.—Petition of the lunatic and his wife, for leave to supersede the commission upon the petitioner being examined, or for a traverse: dismissed.—B. 44, No. 63.



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in which an application for leave to traverse an inquisition appeared to have been refused by Lord Eldon.

Mr. *Rogers*, in reply, submitted that even if the Lord Chancellor had a discretion in the matter, the circumstance of three of the jurymen having dissented from the verdict, was itself sufficient ground for further inquiry.

On the conclusion of the argument,

THE LORD CHANCELLOR said :—I have certainly often heard Lord Eldon express an opinion that a traverse was matter of right, though it is difficult to reconcile that opinion with the previous authorities, and the practice which has prevailed from the earliest times of coming, in form at least, to ask for leave.

If leave is given, it is the leave of the Chancellor ; and then, if the traverse turn out unsuccessful, it would be difficult to make the party applying pay the costs of the traverse personally: they would come out of the [\*343] estate ; but if he traverses as matter of right, he would do it at his own risk as to costs.

In this case, if the evidence turns out as it is now represented, I should be very unwilling to adopt any course which would have the effect of throwing on the estate the expense of a traverse. There is no doubt, upon the evidence which I have now heard, that the party is a fit subject for a commission of lunacy.

Mr. *Rogers* then suggested, as a sort of middle course, that the same order should be made which was made in *Sherwood's case*,<sup>(a)</sup> where, he said, Lord Eldon, under similar circumstances, directed an inquiry with reference to the support and residence of a lady who had been found lunatic, without appointing a committee. If such a course, he said, were adopted in the present case, and liberty given to Mr. Asals to attend the master upon the reference on behalf of the lunatic, the present application would not be persisted in.

Mr. *Wakefield* said that he had no objection to such reference, or to Mr. Asals attending the master upon it, provided he did so at his own expense.

THE LORD CHANCELLOR :—If the inquisition is to stand, I cannot, after what I have heard, stop short of appointing a committee ; but if the friends ask for a reference to consider of a scheme for the support, residence, and care of the lunatic, it is an application which I cannot refuse. If Mr. Asals chooses to attend the reference, he may ; and should he make any suggestion [\*344] to the master which shall be for the benefit of the lunatic, it will be very proper that he should be paid his expenses ; if he does not, he will have to bear his own costs of his attendance. All the object that I have, and all that the parties ought to have, is that every thing should be suggested which is likely to contribute to the comfort and benefit of this unhappy person. If, therefore, the inquisition is to stand, the order for the appointment of a committee may be accompanied by a special order for the master to

(a) 19 Ves. 280. See p. 290.



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approve a scheme for the residence and support of the lunatic, Mr. Asals to be at liberty to go in before the master on the consideration of the scheme; and the costs before the master to be reserved. At present, however, I make no order. Let the petition stand over for the parties to consider what course they will adopt.

It having been subsequently intimated to the Lord Chancellor that the petitioner persisted in his desire to traverse the inquisition, his lordship desired to see the petitioner, and, after having had a personal interview with him, now delivered his judgment as follows.

*Aug. 11.*—THE LORD CHANCELLOR:—This is a very distressing case. In the interview I had with this unfortunate gentleman, nothing could be more manifest than his delusions upon one subject, while, on the other hand, nothing could be more rational than his conversation upon all other subjects which I touched upon. And though there is evidence of his having occasionally committed acts of violence, he betrayed no symptoms of it on that occasion, either in his manner or expressions. Upon the inquisition, the great majority of the jury found that he was of unsound mind; and, looking at the evidence, I cannot but be surprised that any of the jury should have differed from that opinion: because "the existence of delusion [\*345] is clearly proved, and upon the question, whether a person having those delusions is of unsound mind or not, no doubt whatever can be entertained. This individual, however, who is perfectly competent to have a volition of his own, and to consider what is most for his interest in matters unconnected with the particular delusions under which he labors, has applied, in the usual way, to traverse the inquisition. He has stated to me all the inconveniences which he apprehends from the prosecution of the commission, and says that, principally owing to the dissent of the three jurymen, he has hopes that, on another trial, the majority of the jury may be in favor of his sanity; and he is deliberately anxious to have the question investigated again.[1]

[1] As to the value of a personal examination by the judge, of the alleged lunatic, Mr. Chancellor Kent, in a case in which the lunatic applied to supersede the commission, observed: "It is difficult to determine when the mind is restored, and the force of the testimony must depend on the circumstance, whether the party has been led to those topics upon which his mind was affected. The disease is often very insidious. I have frequently been visited by lunatics against whom an inquisition has been returned, and a committee appointed. Their object was always to complain of the proceeding or of the committee; and I have rarely been able, on such occasions, to detect the mental infirmity. Lord Eldon has observed, that he once, as counsel, succeeded in getting Lord Thurlow to supersede a commission, and was satisfied from many conferences with the party, that he was perfectly rational. But when he obtained the order of *supersedeas*, and the party came to thank him for his services, he discovered the disorder in five minutes, and regretted all he had done." *In the Matter of Hanks*, 3 Johns. Ch. Rep. 567. It seems, that upon an application to supersede a commission, there must, in general, be an actual appearance of the party for the purpose of personal examination by the Chancellor, or a person acting under his authority, unless dispensed with, under peculiar circumstances. *In the Matter of Dyce Sambre*, 1 Phillips,

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Upon this application, the difficulty I feel arises from the state of the authorities on the subject of traversing an inquisition. Independently of authority, it does seem to me a very wholesome provision of the law that in a proceeding by which a man may be deprived of his liberty, and the control over his property, every means should be afforded to him of having the fact which is the foundation of the proceeding ascertained beyond all doubt and controversy. And for that purpose a traverse was given. Now, it must be remembered, that, at the time that right of traverse was given, the practice of the Crown was to seize the property of lunatics to its own use; and, looking at the purposes to which these inquisitions were at that period frequently made subservient, it is reasonable to suppose that the object of the legislature in the various statutes<sup>(a)</sup> which were passed in early times was to protect the subject against improper inquisitions found at the [\*346] instance of the Crown; and, assuming that to have been the object of the right of traverse, it would be strange if that right was to be exercised only at the discretion of a servant of the Crown. It is true that this necessity for the right of traverse is now diminished, because, though the party is still deprived of the control over his property, the use and enjoyment of it is left to him. But the law upon the right of traverse has undergone no change since that alteration took place; it still depends upon the early statutes which originally gave that right; and though some expressions are to be found in those statutes which seem to point to a discretion in the Chancellor, yet all these statutes upon the subject proceed upon the ground of the necessity of affording some protection to the subject. If, indeed, any distinct authorities were to be found, putting a construction upon these enactments and upon the right which they were intended to give, any inference that one might be disposed to draw, as to their object and effect, from the circumstances of the times in which they were passed, must have yielded to the weight of those authorities; but it is hardly possible to state a case in which the authorities are more equally balanced. I find Lord Hardwicke and Lord Thurlow stating distinctly, that, in their opinion, it is discretionary in the Chancellor; and I find Lord Rosslyn and Lord Eldon holding an equally decided opinion the other way. In the case of *Ex parte Roberts*,<sup>(b)</sup> and in *Barnsley's case*,<sup>(c)</sup> Lord Hardwicke states his opinion that it is discretionary. In *the Matter of Fust*,<sup>(d)</sup> Lord Thurlow expressed a similar opinion, founding his opinion on the cases which had been decided by Lord Hardwicke. In *Ferne's case*,<sup>(e)</sup> Lord Rosslyn says it is of right.

436. On the execution of the commission, the commissioners and the jury have a right to inspect and examine the lunatic. *Ex parte Southcote*, Amb. 109, cited 1 Johns. Ch. Rep. 102. And it is the privilege of the party against whom a commission of lunacy is issued, to be present at, and to have notice of its execution; unless otherwise directed by the court under peculiar circumstances, as in cases of furious madness. In *the Matter of Tracy*, 1 Paige, 580.

(a) See 36 Ed. 3, c. 13; 8 Hen. 6, c. 16; 18 Hen. 6, c. 6; 2 & 3 Ed. 6, c. 8, s. 6.

(b) 3 Atkyns, 5, and 308.

(c) *Ib.* 184.

(d) 1 Cox, 418.

(e) 5 Ves. 832.

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\*And in *Ward's case*,<sup>(a)</sup> the application being on behalf of a stranger, Lord Eldon refused it; but he stated, that if it had been on behalf of the person found a lunatic, it would have been a matter of right, that is, he would not have been at liberty to refuse it: and he expressed the same opinion in *Sherwood's case*,<sup>(b)</sup> where he again says that the traverse is a matter of right. [\*347]

Now, if I had not a strong disposition in favor of the right—it being, I conceive, essential to the protection of every individual that he should have the power, by a proceeding of his own, to challenge the decision of a jury summoned adversely against him, which takes from him his personal liberty and the enjoyment of his property—I think I am bound, on a question of so much doubt, to adhere to the last decisions, where I find they stand on the authority of two such men as Lord Rosslyn and Lord Eldon, who had the former decisions under their consideration, and must be supposed to have had regard, in forming their opinion, to the contrary opinion which had been entertained by the two preceding chancellors.[2]

In the present case, after what I have seen of this individual, I cannot entertain any expectation that any other jury will come to a different conclusion. The gentleman himself has very small means of subsistence; sufficient, indeed, to support him in a considerable degree of comfort at present; but totally inadequate to meet the expense of an adverse litigation. Those, therefore, who have his interest at heart would, in my opinion, be acting the part of friends to him if they would endeavor to prevent this useless expenditure of money: but when the individual tells me that he is desirous of \*traversing, and when he is perfectly competent to exercise an act [\*348] of volition upon that subject, I cannot feel that I am justified in saying that the finding of one jury shall be conclusive and that he shall be deprived of that right which, in my opinion, upon the statutes, and the authority of Lord Eldon and Lord Rosslyn, he is entitled to.

I am, therefore, of opinion, that if the application is persevered in, I cannot refuse him the right of traverse.

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Mr. *Wakefield* then asked that the proceedings under the commission might go on, pending the traverse,<sup>(c)</sup> observing that if some member of the

(a) 6 Ves. 579.

(b) 19 Ves. 280.

(c) See 6 G. 4, c. 53, s. 4.

[2] In New York, under the statutes of the state, it rests in the discretion of the Court of Chancery to permit the alleged lunatic to traverse the inquisition or not; but it may in its discretion direct such proceeding to be had, and in such manner as may be most useful and expedient, so as best to inform its conscience, and afford the safest conclusion as to the existence of the fact of lunacy. The lunatic may be brought into court, after the inquisition is returned, and an inquiry to be made by inspection, or an issue may be awarded to ascertain by a verdict at law, the existence or continuance of the lunacy. And where an issue is awarded, the most usual and proper course is, to have it made up and prepared for trial, under the direction of the court, instead of delivering over the record and traverse, after the Attorney General has joined issue thereon, to the court of law, as practised in England. *In the Matter of Wendell*, 1 Johns. Ch. Rep. 600; *In the Matter of McClean*, 6 Johns. Ch. Rep. 440; *In the Matter of Tracy*, 1 Paige, 580.

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lunatic's family—his brother Mr. Luke Bridge senior, or one of his nephews, who were farmers, residing in Derbyshire—were appointed committee, he might go and reside with them in the country, and the expense of a keeper, whose attendance upon him, so long as he continued to reside in the neighborhood of London, was indispensable in order to prevent his returning to the bank, and which was more than his income would afford, would be saved.

Mr. *Rogers*, on the other hand, renewed his former suggestion as to the order made in *Sherwood's case*,<sup>(b)</sup> saying that his client had a great repugnance to going to reside with his relations in the country.

THE LORD CHANCELLOR:—That order was made under a different jurisdiction. As I am acting only in lunacy, if I interfere at all, I must [\*349] treat the party as a lunatic; and if he persists in \*residing in London, I can only take one course, and that is, to appoint a committee; for when I am told that, as part of his insanity, he has actually attempted the life of a person at the bank, I should be incurring a very serious responsibility if I were to allow him to go at large, where he would have an opportunity of returning to the bank. If, however, he is incommoded by the constraint and expense of having a keeper over him pending the traverse, and, in order to avoid that, would consent to go and reside where Mr. Wakefield suggests, and where he would be perfectly safe, I would not make an order for the proceedings to go on in the meantime. If he refuses to comply with this suggestion—and he is perfectly competent to understand it—I can only take one course: I must treat him as a lunatic, taking every care of him that a lunatic is entitled to, according to his circumstances, until, by succeeding in his traverse, he shows me that he is not a lunatic.

Mr. *Rogers* then said, that, from his personal communications with his client, he had reason to believe that he would not accede to that proposal, and, upon that supposition, asked that a competent sum might be allowed out of the fund in court to defray the expense of the traverse. Such an allowance, he said, was always made when the application to traverse came from the lunatic himself: and he mentioned the case of Sir Gregory Page Turner,<sup>(b)</sup> in which such an allowance had been made.

[\*350] \*THE LORD CHANCELLOR:—Before I make any order of that kind, I should like to have the answer of Mr. Bridge, whether he intends to go on with the traverse at all. It is by no means to be assumed that I am to advance money for a purpose which I am quite sure will tend to the injury of the individual.

(a) 19 Ves. 280. See p. 290.

(b) The entry in the lunacy office, of the order here referred to, was as follows:—

“27th June, 1826.—*Ex parte Sir Gregory Page Turner*.—Order for the committee of the estate, to pay solicitor of lunatic 500*l.* on account of the expenses of the traverse; for committee to be at liberty to oppose the said traverse, and for the lunatic to appear on the trial.”

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Mr. *Rogers* said, unless the usual order was made, it would deprive his client of the means of traversing.

THE LORD CHANCELLOR:—If he has any probability of succeeding, he will find no difficulty in obtaining the means of traversing. I do not refuse the allowance: but this is not a case in which I should encourage the proceeding, and I therefore make no order at present.[3]

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The petitioner ultimately consented to go and reside with his relatives at Pilsley in Derbyshire; and, upon that consent being communicated to the Lord Chancellor, his lordship made the following order:—

“I do think fit and hereby order, that the said John Bridge be at liberty to traverse the said inquisition, if he shall be advised and think fit so to do, and, in such case, that he do proceed to the trial of such traverse within six months from the date of this order; but the said Luke Bridge hereby consents that in case the said John Bridge shall not proceed to a trial of the traverse within the period so limited, the delay shall not prejudice the said John Bridge in

[3] The right of the supposed lunatic, or those acting on his behalf, to have “the pecuniary means of resisting the commission,” is recognized by Lord Lyndhurst, *In re Holmes*, 4 Russ. 182, 187,—“but, at the same time, his property must be preserved from all improper interference.”—In a much more recent case, (August, 1843,) a certain sum of money was found, by the master’s report, to be due from the estate of a deceased lunatic to his solicitor, for the costs of an unsuccessful traverse to an inquisition *de lunatico inquirendo*. On exceptions to the report, the item was allowed, and Knight Bruce, V. C. said: “It cannot be, that an alleged lunatic is so far deprived of the means of defending himself, as to be prevented from having the benefit of a solicitor, unless the solicitor be employed by a third party, or lose his costs if the proceedings are unsuccessful; yet that would be the result if the present objection were allowed. I apprehend the law to be, that if a man is alleged to be a lunatic, whether truly or not, he may employ, (as far as he can be said to exercise volition on the subject,) a solicitor, not only to resist the commission, but afterwards for the purpose of traversing it; and that, although the proceedings fail, the lunatic’s estate is liable for the costs, subject to this—that if any thing fraudulent or unfair—or, perhaps, I may go so far as to say, frivolous or litigious—appears to have taken place on the part of the solicitor, the court may say, that no debt arises. There is no evidence of that nature here, and therefore, the amount of costs not being impeached, I must take it to be a fair debt.” *Wentworth v. Tubb*, 2 Yo. & Coll. C. C. 537. “In every case of this kind the court must exercise a sound discretion, regulated by the particular circumstances, so that while the party proceeded against is not deprived of the means of protecting his legal rights, the property, which is necessary for the support of himself and his family, shall not be unnecessarily wasted in useless litigation.” Walworth, Ch. *In the matter of Tracy*, 1 Paige, 583. *In the matter of McClean*, 6 Johns. Ch. Rep. 440. A party had an interest in establishing the sanity of a lunatic, in order to give validity to a deed executed to him by the latter, a short time before he was found *non compos*, and had procured an issue to be awarded by the court to try the question of lunacy, which was found against him, and he was ordered to pay the costs—Kent, Ch. “The question of costs is discretionary, and depends upon the character of the application, and the conduct of the party. In the present case, a relative of the lunatic had procured a deed from him, while a lunatic, and his interest in establishing that deed, and not concern or humanity for the lunatic, was probably the motive for the traverse of the inquisition. He was struggling for his own advantage; and it is just and reasonable that he should pay the costs to which he has, without just ground, and in furtherance of his claim, subjected the estate of the lunatic.” *In the matter of Folger*, 4 Johns. Ch. Rep. 169. And see *In the matter of Walker*, ante, 147, 150. As to the allowance of money to defray expense of litigation, see *Nye v. Maule*, 4 Myl. & Cr. 342; *Johnstone v. Todd*, 3 Beav. 218; *Peck v. Beechey*, 2 Sim. 40.



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any application he may be advised to make for liberty to traverse the said inquisition after the expiration of the said six months. And the said [\*351] John Bridge, by his counsel, having \*undertaken to proceed to Pilsley, in Derbyshire, and take up his residence there with his brother Luke Bridge, I do think fit, and hereby further order that the said John Bridge be at liberty to apply for and receive, and that the Board of Customs be at liberty to pay him, the arrears and accruing payments of his allowance or pension until further order. And I do hereby direct that all further proceedings under the said commission of lunacy be stayed, until further order; and that any or either of the parties hereto be at liberty to apply touching the same, or any or either of the matters hereinbefore mentioned, as they may be advised."

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 BOWER v. MARRIS.

1841: July 8; August 7.

Where one of two obligors in a joint and several bond had become bankrupt, and the obligee having by several dividends in the bankruptcy been paid 20*s.* in the pound upon the amount of principal and interest due at the date of the commission, also carried in a claim in respect of the same bond under a decree in a suit for the administration of the estate of the co-obligor, who had died: Held, that the amount due to the obligee, in respect of such claim, was to be computed by treating the dividends as ordinary payments on account, that is, by applying each dividend, in the first place, to the payment of the interest due at the date of such dividend, and the surplus, if any, in reduction of the principal; and *semble*, the same principle of computation is applicable in bankruptcy as between the bankrupt and the creditors, where there is a surplus of the estate after payment of 20*s.* in the pound upon all the debts proved.

On the 6th of April, 1805, Thomas Marris and Joseph Marris executed a joint and several bond to Jonathan Dent, in the penalty of 26,400*l.*, conditioned for the payment of the sum of 13,200*l.* and interest. Shortly afterwards, Joseph Marris died, having devised and bequeathed all his real and personal estate to Thomas Marris, whom he also appointed executor of his will. Thomas Marris proved the will, and afterwards became bankrupt, in the month of January, 1812, at which time there was due upon the [\*352] bond the sum of 13,655*l.* 15*s.*, \*being the amount of the principal debt, and 455*l.* 15*s.* arrear of interest. Jonathan Dent proved that amount under the bankruptcy, and also went in, as a bond creditor, under a decree in a creditor's suit, which was instituted, shortly after the bankruptcy, against Thomas Marris, as executor of Joseph, and against his assignees, for the administration of the estate of Joseph. In consequence of some difficulties which occurred in realizing the estate of Joseph, great delay took place in the prosecution of that decree; so that before the master made his report, six dividends had been declared in the bankruptcy, from which Jonathan Dent received 20*s.* in the pound on the amount of his proof. The last



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of those dividends was paid on the 10th of January, 1834. In the year 1840, the master made a separate report upon the claim of Jonathan Dent under the decree, by which he found that 15,064*l.* 14*s.* 6*d.* still remained due upon the bond, having arrived at that result by treating the dividends which had been received under the bankruptcy as ordinary payments on account; that is to say, by applying each dividend in the first place to the payment of the interest which would have been due at the date of such dividend, if no bankruptcy had occurred, and the surplus only, if any, in reduction of the principal which, according to that mode of applying the dividends, from time to time remained due.

The defendants, the assignees, had carried in objections to the draft of that report, by which they had insisted, in substance, that inasmuch as the debt in respect of which dividends were declared in bankruptcy, was the amount of principal and interest due at the date of the commission, the receipt of each dividend by the creditor operated as an extinguishment of such principal and interest respectively, to the extent of the portion of the dividend which was attributable to each, and, \*consequently, that in com- [\*353] puting what was due upon the bond from the estate of Joseph Marria, the master ought to confine himself to a calculation of interest upon the principal from time to time remaining due according to that mode of applying the dividends; whereas, by the mode of computation which he had adopted, he had applied dividends which had been appropriated and accepted in satisfaction of one debt—namely, the amount of principal and interest due at the date of the commission,—to the payment of another and a different debt—namely, the subsequently accruing interest.

The master having overruled those objections, and having made his report to the effect before mentioned, the defendants, the assignees, presented a petition, praying that it might be referred back to the master to review his report with a declaration, that each successive dividend under the bankruptcy, when declared and paid, was to be attributed to the amount of the debt proved; that is, to the principal money and the interest due thereon at the date of the commission. On the other hand, the personal representatives of Jonathan Dent, who had died, presented a counter petition, praying that the report might be confirmed.

The two petitions having come on to be heard together before the Vice-Chancellor, his honor granted the prayer of the former petition, and dismissed the other with costs.

The representatives of Jonathan Dent having appealed from that decision the appeal now came on to be heard.

The arguments urged, and the principal authorities cited on both sides, are so fully reviewed by the Lord \*Chancellor in his judgment, [\*354] that it is considered unnecessary to state them here. The only cases cited in the argument, which are not noticed in the judgment, were those of

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 1841.—Bower v. Marris.
 

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*Smithson v. Ingham*, (a) *Martin v. Brecknow*, (b) and *Taylor v. Keymer*, (c) all of which were cited on the part of the appellaut.

Mr. *Wigram*, Mr. *Bethell*, and Mr. *Heathfield* appeared in support of the appeal.

Mr. *Jacob* and Mr. *Glasse*, for the respondents, the assignees of Thomas Marris.

Mr. *Richards* also appeared for the official assignee of Thomas Marris; but the Lord Chancellor refused to hear him, saying that the official assignee could not be heard separately from the other assignees.

*Aug. 7.*—THE LORD CHANCELLOR :—If there being a surplus of a bankrupt's estate, after paying 20s. in the pound upon the debts proved, were not, unfortunately, a rare occurrence, this would be a very important case. One of two joint and several obligors becomes bankrupt, and against his estate the obligee proves the principal and a small arrear of interest due at the date of the commission, and, in the course of many years, receives, upon different dividends, 20s. in the pound upon the debt so proved, and afterwards, under a decree for the administration of the estate of the co-obligor, claims payment of what he has not received from the estate of the bankrupt, and in-  
 [\*355] sists that the amount is to be calculated by applying the amount of dividends from time to time received, in discharge of the interest then due, and the surplus, if any, in discharge, *pro tanto*, of the principal. This, no doubt, is the ordinary mode of calculation, and is the general course of dealing in cases of mortgages, bonds, and other securities, as the principal does, and the interest due does not, carry interest. No creditor would apply any payment to the discharge of part of the principal whilst any interest remained due. If, therefore, these had been merely payments on account, there would be no question between the parties; but it is said on behalf of the obligor's estate, that the payments by way of dividends under the bankruptcy of the co-obligor were appropriated and were paid to and received by the obligee on account of so much principal money, and therefore that interest from that time ceased upon the amount of such principal money, although large sums were due for interest at the time.

The question, so far as it is a question of principle, turns upon the accuracy of this view of the case: the proposition rests upon this, that the payments consisted of dividends of so many shillings in the pound, and that the sum upon which such dividends were made, being the debt proved, consisted, except a very small part, of the principal due on the bonds, and therefore that, upon the payment of every dividend, so many shillings in each pound of such principal money as the dividends consisted of, was, upon each payment, discharged.

In the first place, as this mode of payment is regulated by acts of parlia-

(a) 2 B. &amp; C. 65.

(b) 2 M. &amp; S. 39

(c) 3 B. &amp; Ad. 320.

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ment, the doctrine of appropriation, which is founded upon the intention, expressed or implied, of the debtor or creditor, cannot have any place in the consideration of the present question. The estate of [\*356] the obligor under administration is liable to pay all that the obligee has not received from the co-obligor; that is to say, the obligee is entitled to his principal and interest up to the time of payment: and he is entitled to apply all payments on account, to the interest due, before he would be bound to apply any part of it towards discharge of the principal. If, therefore, he is bound, because those payments are made under a bankruptcy, to apply them towards discharge of part of the principal which bears interest, and thereby to leave interest due, which does not bear interest, he is a loser by the bankruptcy, although the whole of principal and interest is ultimately paid, and, what is more extraordinary, the co-obligor will, as in the present case, be a gainer by it in the same proportion; for although, being himself bound to pay principal and interest, he could not compel the obligee to accept payment of the principal whilst interest remained unpaid, he would derive the benefit of such payments being so made out of his co-obligor's estate. This would be to give to this mode of payment in bankruptcy the effect of depriving the obligee of part of his debt, and of relieving the obligor from the liability to which he had, by his bond, subjected himself. That would be, manifestly, most unreasonable and unjust, and is attempted to be supported only by the supposed appropriation of the dividends to the payment of so much of the principal: but, in fact, there is no such appropriation. The interest stops at the date of the commission, and, though subsequent interest becomes due, it is not provable under the commission. The bankrupt's estate is taken from him by the commission; and the law, in order to make an equal division amongst the creditors, pays to each a dividend upon the debt proved. But this is merely an arrangement for the convenience of the debtor's creditors. The bankrupt continues indebted for the principal and [\*357] the interest accrued since the commission, although his certificate, if he obtains one, protects him against the liability to the debt; and, being so indebted, payments are made out of his estate to the obligee. Why should such payments have a different effect, than they would have if made by a solvent obligor? Why should they lessen or destroy the remedy which the obligee would have had against a co-obligor? Suppose the bankrupt does not obtain his certificate, but afterwards acquires property, and is sued by the obligee, ought not the obligee to be entitled to compel payment of all he could have demanded if there had not been any bankruptcy? Suppose the assignees realize a surplus of the estate, ought the obligee, in the case supposed, to suffer, and the bankrupt's estate to benefit, by the bankruptcy?

By the 132nd section of the 6 G. 4, c. 16, the bankrupt is not to receive the surplus until all creditors have received interest on their debts, to be calculated from the date of the commission. This provision obviously intended to make good to the creditors that interest which, by the course of admin-

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istration in bankruptcy, they had lost. Interest is stopped at the date of the commission, because it is supposed that the estate will be deficient: it proves to be more than sufficient: Why is the creditor to suffer, and the bankrupt to benefit, by attributing the dividends to principal, instead of to the interest due? The creditor in that case will not have received interest upon his debt to the same extent as he would, if there had been no bankruptcy; and yet, the act must have intended to place him in as favorable a situation.

[\*358] \*If there had been no decision upon this subject, I should have thought these reasons conclusive in favor of the mode of calculation adopted by the master; but I find from the year 1745, to the case of *Ex parte Higginbottom*(a) in 1826, a succession of cases in which this principle was acted upon; and although it was not, in all, matter of adjudication, they prove that such was the recognized rule, so well understood as not to be the subject of question. It appears to have been carefully established by Lord Hardwicke in *Bromley v. Goodere*.(b) The order, indeed, appears to have been framed by himself, and is so expressed as to leave no doubt of its having been most carefully considered; and this was the opinion of that great judge, of the justice of the case, without the aid which the statute now affords. In *Ex parte Morris*.(c) Lord Rosslyn refers to this case, and says the whole must be computed as running interest. In *Ex parte Mills*.(d) Lord Rosslyn says, Lord Hardwicke's case has been pursued by every judge. It has now been above fifty years confirmed by every judge. The attempt there, was to depart from that order, but not upon this point. If, however, upon this point that order had been thought questionable, we should neither have found such abstinence from objection on the part of the counsel, nor such strong approbation on the part of the judge. In *Butcher v. Churchill*.(e) Sir W. Grant seems to refer to the mode of calculation adopted by Lord Hardwicke, and with approbation. He says, "Lord Hardwicke held clearly that interest was referable to the original debt, as long as that was undis-  
charged, and allowed it in that instance until the whole was wound  
[\*359] up." In *Ex parte Devy*.(g) Lord Manners directed the commissioner to take an account of the interest, in the same manner as Lord Hardwicke had directed in the above mentioned case; and in *Ex parte Koch*.(h) Lord Eldon directed his order to be in the same words as in Lord Hardwicke's order. This particular point in that order had not been the subject of discussion; but Lord Eldon's direction proves that he had considered and approved the whole of it. Against all this authority, there is nothing but the case of *Ex parte Higginbottom*.(i) in which no authority was cited, and which Sir J. Leach decided upon the supposition that the mode of calculation directed by Lord Hardwicke would give compound interest, which was clearly a mistake.

(a) 2 G. &amp; J. 123.

(b) 1 Atk. 75.

(c) 1 Ves. jun. 132.

(d) 2 Ves. jun. 295.

(e) 14 Ves. 567, 574.

(g) 2 Ba. &amp; Be. 213.

(h) 1 V. &amp; B. 342.

(i) 2 G. &amp; J. 123.

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It is true, that in certain cases the dividend has been considered as an aliquot part of the debt upon which it is paid ; but in all those cases the ground of the decision has been that to adopt any other rule would work injustice, and defeat the contract between the parties. Such were the cases of *Puley v. Field*,<sup>(a)</sup> *Bardwell v. Lydall*,<sup>(b)</sup> *Raikes v. Todd*,<sup>(c)</sup> and *Ex parte Holmes*.<sup>(d)</sup> These are not authorities for applying that rule to cases in which it would create, instead of preventing, injustice, and defeat, instead of protecting, the contract between the parties. In those cases, the court has looked to the effect which might be produced upon the interest of the parties, and not to the principle of appropriation. It was said, that from the date of the case of *Ex parte Higginbottom* a practice has prevailed of calculating interest in the manner there directed. I have caused inquiry to be \*made upon the subject, and do not find that to be the case. Indeed, [\*360] the instances of there being a surplus are so few, that there have not been materials for establishing a practice. I have also had searches made to ascertain whether any order could be found, tending to show what the practice has been ; but I have not derived any assistance from such searches.

It has been suggested that the case of *Devaynes v. Noble* introduced some change in the law of appropriation, and that Lord Hardwicke's order would be inconsistent with the present state of the law founded upon that case. *Devaynes v. Noble* did not establish any new law ; the points there expounded do not appear to me to have any application to the present ; and the general rules for the appropriation of payments are of much older date than that of Lord Hardwicke's order, and are derived from the civil law.

I am of opinion that, upon principle and authority, the master's report was correct, and therefore that the Vice-Chancellor's order must be reversed, and the petition excepting to the report dismissed, with costs, and an order made upon the other petition, confirming the report.[1]

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 \*BOOTH v. CRESWICKE.

[\*361]

1841 : January 30 ; August 14.

A defendant, who has allowed a decree *nisi* to be made absolute against him, by not appearing to show cause against it, is not entitled, as of course, to a rehearing, and therefore it is irregular for a party so situated to obtain an order to rehear the cause upon the common petition : the proper course is to present a special petition, praying that the order making the decree absolute may be discharged, and that the party may be at liberty to show cause against the decree.

THIS was a suit for redemption and foreclosure against several defendants, one of whom made default at the hearing, and a decree *nisi* for foreclosure

(a) 12 Ves. 435. (b) 7 Bing. 489. (c) 8 Ad. & Ellis, 846. (d) 18 Law Journ. 33.

[1] *State of Connecticut v. Jackson*, 1 Johns. Ch. Rep. 13 ; *Stoughton v. Lynch*, 2 Johns. Ch. Rep. 209.



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 1841.—Booth v. Creswicke.
 

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was taken against him ; and on the 14th of June, 1837, the defendant not appearing to show cause, that decree was made absolute.

The master, having taken the accounts directed by the decree, appointed the 24th of May, 1839, for payment of the amount which he found to be due from the defendant to the plaintiff, in default of which the defendant was to stand absolutely foreclosed. Before that day arrived, the time so fixed was enlarged, upon the application of the defendant, until the 31st of July, 1839. On the 25th of July, 1839, the defendant obtained a conditional order for a further enlargement of the time ; but, having failed to comply with the condition, an order was made, on the 3d of August, 1839, that he should stand absolutely foreclosed. Before that order was drawn up, it was, on the application of the defendant, suspended, and the time for payment was again enlarged upon certain conditions, with which, however, the defendant again failed to comply, and the order of the 3d of August, 1839, consequently remained in force.

In the month of January, 1841, the defendant obtained an order to rehear the cause, as to part of the decree, upon the common petition of appeal ; and the cause now came on to be reheard accordingly.

Mr. *Wigram* and Mr. *Parry*, appeared for the appellants.

[\*362] \*Mr. *Richards* and Mr. *Beales*, appeared in support of the decree.

No preliminary objection having been taken to the form in which the appeal had been brought on, it was opened, on the part of the appellant, in the usual way : it was insisted, however, on the part of the respondent, in the course of the argument, that a defendant who allowed a decree to be made absolute against him by his own default, stood in a much less favorable position for objecting to the decree than a party who had opposed it in the first instance ; and further, that in this case, the applications which the defendant had made to enlarge the time for payment of the money, implied such an acquiescence in the decree on his part as precluded him altogether from the right to call it in question. Upon that part of the argument,

THE LORD CHANCELLOR observed, that if the respondent had intended to rely on those objections, he ought to have moved to discharge the order for setting down the cause to be reheard ; that the court was then acting in pursuance of that order, and rehearing the decree ; and, upon a rehearing, it could look only at what the record itself contained.

The argument, however, was allowed to proceed both upon the merits and upon the point of form ; and, with reference to the latter point, the following cases were cited and commented on :—*Cunyngham v. Cunyngham*,<sup>(a)</sup> *Vowles v. Young*,<sup>(b)</sup> and *Attorney General v. Brooke*.<sup>(c)</sup>

[\*363] \**Aug. 14.*—On this day the LORD CHANCELLOR said :—It appears from the authorities that the practice in cases of this kind is involved in considerable doubt and difficulty. Lord Hardwicke, in two cases which came

(a) Ambler, 89 ; 1 Dick. 145.

(b) 9 Ves. 172.

(c) 18 Ves. 319 ; 3 Meri. 698.



1841 —Booth v. Creswicke.

before him, appears to have expressed an opinion, in which I perfectly concur, that it is irregular to bring such a case before the court upon an ordinary petition of rehearing. A party who has allowed a decree *nisi* to be made absolute against him has not the right which the suitor in general has to have his cause reheard. The court requires him to make out a special case for leave to be let in. And it is obvious how extremely inconvenient it would be if that were not the rule. The court, in such a case, has had no opportunity of exercising its judgment: the plaintiff takes such a decree as he thinks he can abide by: the defendant not appearing to show cause, the decree is made absolute: proceedings go on in the master's office, and then, after a considerable time has elapsed, and great expense has been incurred, (there being no more limit as to time than in ordinary cases,) the defendant comes and says, "Now I am ready to have my case heard and decided: all that has yet been done, and all the inquiries consequent upon the decree are to go for nothing, and the court is, as a matter of course, to hear me state my case as if the cause were now coming on to be heard for the first time." It is obvious that such a course of proceeding would lead to the greatest inconvenience; for, although it is true that the court would never let the appellant in, unless upon the terms of paying all the costs occasioned by his default, yet that would be a very inadequate compensation to the other party for the delay in the adjudication of his claim, which, having been once decided in his favor, is now to be heard over again.

\*For that reason, the common order of rehearing in a case like this [\*364] is improper, and the proper course would have been for the respondent to have moved to discharge it, because, so long as it remains, there is an order that the cause shall be reheard. That should have been the first step. On the other hand, the defendant's course should have been to apply, by petition, to discharge the order making the decree absolute; because, until he has got rid of that order, he cannot be permitted to have the cause reheard. Upon an application of that kind, the court would have an opportunity of being informed, which it could not be on an ordinary rehearing, of the circumstances which the party had to allege in explanation of his default, and might, upon consideration of those circumstances, impose such terms upon him as should seem just, if it should see grounds for thinking that he had such a case upon the merits as would justify the court in disturbing the decree. If the matter stood upon the decisions in Lord Hardwicke's time, there are two cases, (a) (of which I am sorry that I have not got my note in court) in which he lays down the rule of proceeding as I have stated it. There is, however, a case before Lord Eldon, (b) in which also this objection arose, and, unfortunately, I think, Lord Eldon, though he recognized the validity of the objection, and stated what the practice ought to be; yet, from a desire to save

(a) His lordship appears to have referred to the cases of *Cunyngham v. Cunyngham*, 1 Dick. 145, *Kinsay v. Kinsay*, *ibid*.

(b) Probably *Vowles v. Young*, 9 Ves. 172.

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1841.—Booth v. Creswicke.

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the party expense and to come at once to what he thought must be the result of these preliminary proceedings, he permitted the rehearing to go on : that is to say, it does not appear he actually reheard the case ; but he said [\*365] he would treat the case as if it was upon a \*rehearing, at the same time imposing such terms and conditions as would have been imposed if those preliminary applications had been regularly made. I do not think that was a wholesome departure from the clearly established rule which existed before that time, though I have no doubt it arose from a very benevolent motive of saving the party costs in that case ; but, unfortunately, these indulgences are very apt to lead to very great irregularities in the general practice ; and the adoption of such a precedent would be an encouragement to defendants to permit a cause to go on till it suits their convenience to come in, and then on a rehearing to open the whole case, without giving the court the means of judging how far the defendant is entitled to the indulgence, or on what terms and conditions it should be granted.

I think it is desirable that the practice, as it existed in Lord Hardwicke's time, should be restored, there being no departure from it except in the case which I have just mentioned ; and that the right course in this case will be, that this petition should stand over, to be dealt with according to the opinion which the court may come to when an application, of the kind described in the cases before Lord Hardwicke, shall have been made, for the purpose of enabling the party to come to the court and ask for a rehearing.

The order will be, that the petition of appeal stand over, with liberty to the parties to make such applications as they may be advised.[1]

[1] After a decree by consent, there can be no rehearing or appeal. *Coster v. Clarke*, 3 Edw. Ch. Rep. 405. A rehearing after a decree is not a matter of right, but rests in the sound discretion of the court. *Daniel v. Mitchell*, 1 Story's Rep. 198.

## ORDER OF COURT.

*26th August, 1841.*

The Right Honorable CHARLES CHRISTOPHER LORD COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honorable HENRY LORD LANGDALE, Master of the Rolls, doth hereby, in pursuance of an Act of Parliament, passed in the fourth year of the reign of Her present Majesty, intituled "An Act for facilitating the Administration of Justice in the Court of Chancery," and of an Act passed in the fourth and fifth years of the reign of Her present Majesty, intituled "An Act to amend an Act of the Fourth Year of Her present Majesty, intituled 'An Act for facilitating the Administration of Justice in the Court of Chancery,'" order and direct in manner following; that is to say,—

### I.

A "Solicitors' book" to be kept at Six Clerks' Office.

That there shall forthwith be prepared a proper alphabetical book for the purposes after mentioned, and that such book shall be called the solicitors' book, and shall be publicly kept at the office of the Six Clerks, to be there inspected without fee or reward.

### II.

In which solicitors to enter their places of business. Fee for such entry.

That every solicitor, before he practise in this Court, in his own name solely, and not by an agent, whose name shall be duly entered as after mentioned, \*and every solicitor, before he practise as such agent, [\*367] shall cause to be entered in the solicitors' book in alphabetical order, his name and place of business or some other proper place in London, Westminster, or the Borough of Southwark, or within two miles of Lincoln's Inn Hall, where he may be served with writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications in causes and matters depending in this court; and as often as any such solicitor shall change his place of business or the place where he may be served as afore-said, he shall cause a like entry thereof to be made in the solicitors' book; and that the above mentioned entries shall be made in such book by the said Six Clerks, who shall be entitled to a fee of 1s. for every such entry; and that the fund arising from such payment shall be applied, in the first instance, in paying the expenses of providing and keeping such book.

### III.

Writs, &c. to be served at place so entered; or, if no entry, at Six Clerks' Office.

That all writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications, which do not require personal service upon the party to be affected thereby, shall be deemed sufficiently served if

such document, or a copy thereof, as the case may be, shall be left at the place lastly entered in the solicitors' book by the solicitor of such party ; and if any solicitor shall neglect to cause such entry to be made in the solicitors' book as is required by the Second Order, then the fixing up a copy of any such writ, notice, order, warrant, rule, or other document, proceeding, or written communication for such solicitor in the said Six Clerks' Office, shall be deemed a sufficient service on him, unless the court shall, under special circumstances, think fit to direct otherwise.

[\*368]

**\*IV.**

Or, with consent, by post or otherwise.

That if any solicitor shall give his consent in writing that the service of all or any writs, notices, orders, warrants, rules, or other documents may be made upon him through the post-office or otherwise, such service shall be deemed sufficient if made in such manner as such solicitor shall have so agreed to accept ; but it shall be competent for any solicitor giving such consent, at any time to revoke the same by notice in writing.

**V.**

No proceedings to be taken until entry made.

That no person shall be allowed to appear or act, either in person, by solicitor or counsel, or to take any proceedings whatever in this court, either as plaintiff, defendant, petitioner, respondent, party intervening, or otherwise, until an entry of the name of his solicitor and his solicitor's agent, if there be one, or if he act in person, his own name, and address for service shall have been made in the solicitor's book at the office of the Six Clerks ; but if such address of any person so acting in person, shall not be within London, Westminster, or the Borough of Southwark, or within two miles of Lincoln's Inn Hall, then all services upon such person, not requiring to be made personally, shall be deemed sufficient if a copy of the writ, notice, order, warrant, rule, or other document to be served, be transmitted to him through Her Majesty's post-office, to such address as aforesaid.(a)

**VI.**

Process to enforce decrees, &c.

That no writ of attachment with proclamations, nor any writ of rebellion, be hereafter issued for the purpose of compelling obedience to any process, order, or decree of the court.

[\*369]

**\*VII.**

And appearance.

That no order shall hereafter be made for a messenger, or for the serjeant-

(a) On the 19th of November, 1841, Lord Lyndhurst (Lord Chancellor) with the concurrence of the other judges of the court, issued an order directing that the first five of these orders should not take effect till the first day of Easter term, 1842.

at-arms, to take the body of the defendant for the purpose of compelling him to appear to the bill.

## VIII.

Defendant omitting to appear within eight days after service of subpoena, defendant may obtain leave to enter appearance for him.

That if the defendant, being duly served with a subpoena to appear to and answer the bill, shall refuse or neglect to appear thereto, the plaintiff shall, after the expiration of eight days from such service, be at liberty to apply to the court for leave to enter an appearance for the defendant. And the court, being satisfied that the subpoena has been duly served, and that no appearance has been entered by the defendant, may give such leave accordingly; and that thereupon the plaintiff may cause an appearance to be entered for the defendant. And thereupon such further proceedings may be had in the cause as if the defendant had actually appeared.

## IX.

After attachment issued for want of answer, and *non est inventus* returned, sequestration to issue.

That upon the sheriffs' return, '*non est inventus*,' to an attachment issued against the defendant for not answering the bill, and upon affidavit made that due diligence was used to ascertain where such defendant was at the time of issuing such writ, and in endeavoring to apprehend such defendant under the same, and that the person suing forth such writ verily believed, at the time of suing forth the same, that such defendant was in the county into which such writ was issued, the plaintiff shall be entitled to a writ of sequestration in the same manner that he is now entitled to such writ, upon the like return made by the sergeant-at-arms.

## X.

Writ of execution and attachment to enforce decrees, &c. abolished.

That no writ of execution nor any writ of attachment shall hereafter be issued for the purpose of \*requiring or compelling obedience [\*370] to any order or decree of the High Court of Chancery; but that the party required by any such order to do any act shall, upon being duly served with such order, be held bound to do such act in obedience to the order.

## XI.

After service of decree, &c. and disobedience, sergeant-at-arms to go.

That if any party who is by an order or decree ordered to pay money, or do any other act in a limited time, shall, after due service of such order, refuse or neglect to obey the same according to the exigency thereof, the party duly prosecuting such order shall, at the expiration of the time limited for the performance thereof, be entitled to an order for a serjeant-at-arms, and such other process as he hath hitherto been entitled to upon a return, '*non est inventus*,' by the commissioners named in a commission of rebellion issued for non-performance of a decree or order.

## XII.

Decrees, &c. to specify time within which performance required. Consequence of disobedience to be indorsed on copy served.

That every order or decree requiring any party to do an act thereby ordered, shall state the time after service of the decree or order within which the act is to be done ; and that upon the copy of the order, which shall be served upon the party required to obey the same, there shall be indorsed a memorandum, in the words, or to the effect following ; viz.—“If you, the within named A. B., neglect to perform this order by the time therein limited, you will be liable to be arrested by the sergeant-at-arms attending the High Court of Chancery ; and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order.”

## XIII.

On non-delivery of possession, writ of assistance to issue.

That upon due service of a decree or order for delivery of possession, and upon proof made of demand and refusal to obey such order, the party prosecuting the same shall be entitled to an order for a writ of assistance.

## XIV.

Form of memorandum at foot of subpoena to appear and answer.

That the memorandum at the foot of the *subpœna* to appear and answer, shall hereafter be in the form following ; that is to say,—“Appearances are to be entered at the Six Clerks’ Office in Chancery Lane, London ; and if you do not cause your appearance to be entered within the time limited by the above writ, the plaintiff will be at liberty to enter an appearance for you ; and you will be subject to an attachment and the other consequences of not answering the plaintiff’s bill, if you do not put in your answer thereto within the time limited by the General Orders of the Court for that purpose.”

## XV.

Orders to be enforced for and against persons not parties, by the same process as if parties.

That every person not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause ; and every person, not being a party in any cause against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause.

## XIV.

Defendant not bound to answer unless specially interrogated. Answer merely stating ignorance, to part not interrogated, impertinent.

That a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto ; and a defen-



dant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer \*any statement or charge in the bill, [\*372] to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

## XVII.

Interrogatories to be divided and numbered. Note at foot of bill to specify those which each defendant is to answer.

That the interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following; that is to say,—“The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c.,” and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

## XVIII.

Such note to be deemed part of bill.

That the note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

## XIX.

New form of interrogating to bill.

That instead of the words of the bill now in use preceding the interrogating part thereof, and beginning with the words “To the end therefore,” there shall hereafter be used words in the form or to the effect following: “To the end, therefore, that the said defendants may, if they can, show why your orator should not \*have the relief hereby prayed, and may, upon [\*373] their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer; that is to say,—

“1. Whether, &c.

“2. Whether, &c.”

## XX.

Time for pleading, &c. to be the same in country as in town causes.

That a defendant in a country cause shall be allowed no further time for pleading, answering, or demurring to any original or supplemental bill, or

bill of revivor, or to any amended bill, than is now allowed to a defendant in a town cause.

## XXI.

Defendant omitting to plead, &c. in due time, plaintiff may file "traversing note." Effect of such note.

That after the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone) to an original bill, if the defendant shall have filed no plea, answer, or demurrer, the plaintiff shall be at liberty to file a note at the Six Clerks' Office to the following effect: "The plaintiff intends to proceed with his cause as if the defendant had filed an answer, traversing the case made by the bill, and the plaintiff had replied to such answer, and served a subpoena to rejoin." And that a copy of such note shall be served on such defendant in the same manner as a subpoena to rejoin is now served, and such note when filed (a copy thereof being so served,) shall have the same effect as if the defendant had filed an answer, traversing the whole of the bill, and the plaintiff had filed a replication to such answer, and served a subpoena to rejoin. And after such note shall have been so [\*374] filed, \*and a copy served as aforesaid, the defendant shall not be at liberty to plead, answer, or demur to the bill without the special leave of the Court.

## XXII.

Not to be filed without order; how to obtain such order.

That a plaintiff shall not be at liberty to file a note under the Twenty-first Order, until he has obtained an order of the Court for that purpose, which order shall be applied for upon motion, without notice, and shall not be made unless the Court shall be satisfied that the defendant has been served with a subpoena to appear and answer the bill, and that the time allowed to the defendant to plead, answer, or demur, not demurring alone, has expired.

## XXIII.

New form of service which plaintiff may make upon a party, not being an infant, against whom no direct relief is sought.

That where no account, payment, conveyance, or other direct relief is sought against a party to a suit, it shall not be necessary for the plaintiff to require such party, not being an infant, to appear to and answer the bill. But the plaintiff shall be at liberty to serve such party, not being an infant, with a copy of the bill, (a) whether the same be an original, or amended, or supplemental bill, omitting the interrogating part thereof; and such bill, as against such party, shall not pray a subpoena to appear and answer, but shall pray that such party, upon being served with a copy of the bill, may be bound by all the proceedings in the cause. But this order is not to prevent

(a) 1842: 25th Feb—On this day Lord Lyndhurst said he had been requested by the other Judges of the Court to state, that the copy of the bill to be served under this Order was to be either an office copy or an examined copy of the bill when filed, such copy not containing the interrogating part.

the plaintiff from requiring a party against whom no account, payment, conveyance, or other direct relief is sought, to appear to and answer the bill, or from prosecuting the suit against such party in the ordinary way, if he shall think fit. [\*375]

## XXIV.

Memorandum to be entered in such cases in Six Clerks' Office.

That where a plaintiff shall serve a defendant with a copy of the bill under the Twenty-third Order, he shall cause a memorandum of such service, and of the time when such service was made, to be entered in the Six Clerks' Office, first obtaining an order of the Court for leave to make such entry, which order shall be obtained upon motion without notice, upon the Court being satisfied of a copy of the bill having been so served, and of the time when the service was made.

## XXV.

Defendant so served, not appearing in due time, plaintiff may proceed as if such defendant were not a party.

That where a defendant shall have been served with a copy of the bill under the Twenty-third Order, and a memorandum of such service shall have been duly entered, and such defendant shall not, within the time limited by the practice of the Court for that purpose, enter an appearance in common form, or a special appearance under the Twenty-seventh Order; the plaintiff shall be at liberty to proceed in the cause, as if the party served with a copy of the bill were not a party thereto, and the party so served shall be bound by all the proceedings in the cause, in the same manner as if he had appeared to and answered the bill.

## XXVI.

Defendant so served, entering a common appearance, suit to be prosecuted against him in ordinary way, but at defendant's risk as to costs occasioned thereby.

That where a party shall be served with a copy of the bill under the Twenty-third Order, such party if he desires the suit to be prosecuted against himself in the ordinary way, shall be entitled to have it so prosecuted; and in that case he shall enter an appearance in the common form, and the suit shall then be prosecuted against him in the ordinary way; but the costs occasioned thereby shall be paid by the party so appearing, [\*376] unless the court shall otherwise direct.

## XXVII.

Defendant so served may enter special appearance, but at his own risk as to costs occasioned thereby. Form of special appearance.

That where a party shall be served with a copy of the bill under the Twenty-third Order, and shall desire to be served with a notice of the proceedings in the cause, but not otherwise to have the same prosecuted against himself, he shall be at liberty to enter a special appearance under the following form; (that is to say) "A. B. appears to the bill for the purpose of being served with notice of all proceedings therein." And thereupon, the party en-

tering such appearance shall be entitled to be served with notice of all proceedings in the cause, and to appear thereon. But the costs occasioned thereby shall be paid by the party entering such appearance, unless the Court shall otherwise direct.

## XXVIII.

Special appearance not to be entered after the usual time without leave.

That a party shall not be at liberty to enter such special appearance under the Twenty-seventh Order, after the time limited by the practice of the Court for appearing to a bill in the ordinary course, without first obtaining an order of the Court for that purpose; such order to be obtained on notice to the plaintiff, and the party so entering such special appearance, shall be bound by all the proceedings in the cause, prior to such special appearance being so entered.

## XXIX.

Plaintiff prosecuting suit against such defendant in ordinary way, liable to costs occasioned thereby.

That where no account, payment, conveyance, or other relief is sought against a party, but the plaintiff shall require such party to appear to and answer the bill, the costs occasioned by the plaintiff having required such party so to appear and answer the bill and the costs of all proceedings consequential thereon, shall be \*paid by the plaintiff, unless the Court shall otherwise direct.

## XXX.

Devises in trust with power to sell and give receipts, to represent *cestui que trust* in like manner as executors in case of personal estate.

That in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the Court may upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

## XXXI.

Heir not necessary party to suits to execute trusts of will, unless will is to be established.

That in suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

**XXXII.**

One or more of parties jointly and severally liable, may be sued alone.

That in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

**\*XXXIII.**

[\*378]

On demurrer or plea being overruled, plaintiff may file traversing note.

That where a demurrer or plea to the whole bill shall be overruled, the plaintiff, if he does not require an answer, shall be at liberty immediately to file his note in manner directed by the Twenty-first Order, and with the same effect, unless the Court shall, upon overruling such demurrer or plea, give time to the defendant to plead, answer, or demur; and in such case, if the defendant shall file no plea, answer, or demurrer, within the time so allowed by the Court, the plaintiff, if he does not require an answer, shall, on the expiration of such time, be at liberty to file such note.

**XXXIV.**

Demurrer to be held sufficient, unless set down by plaintiff within certain time.

That where the defendant shall file a demurrer to the whole bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within twelve days from the expiration of the time allowed to the defendant for filing such demurrer, cause the same to be set down for argument: and where the demurrer is to part of the bill the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within three weeks from the expiration of the time allowed for filing such last mentioned demurrer, cause the same to be set down for argument.

**XXXV.**

Plea to be held well pleaded, unless set down by plaintiff within certain time.

That where the defendant shall file a plea to the whole or part of a bill, the plea shall be held good to the same extent and for the same purposes as a plea allowed upon argument, unless the plaintiff shall, within three weeks from the expiration of the time allowed for filing such plea, cause the same to be set down for argument, and the plaintiff shall be held to have submitted thereto.

**\*XXXVI.**

[\*379]

No demurrer or plea to be disallowed for covering too little.

That no demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to it.

**XXXVII.**

No demurrer or plea to be disallowed for being covered by answer.

That no demurrer or plea shall be held bad and overruled upon argument,

only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

### XXXVIII.

Defendant may by answer protect himself against giving discovery.

That a defendant shall be at liberty by answer to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer : and that he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

### XXXIX.

Where defect of parties suggested by answer, plaintiff may set the cause down on that objection only ; failing to do so not entitled, as of course, to amend at the hearing.

That where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only ; and the purpose for which the same is so set down shall be notified by an entry, to be made in the Registrar's book, in the form or to the effect following ; (that is to say,) " Set down upon the defendant's objection for want of parties ;" and that where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as [\*380] \*of course, to an order for liberty to amend his bill by adding parties. But the Court, if it thinks fit, shall be at liberty to dismiss the bill.

### XL.

Where defect of parties not suggested by answer, the Court may make a decree saving the rights of absent parties.

That if a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the Court, (if it shall think fit,) shall be at liberty to make a decree saving the rights of the absent parties.

### XLI.

Costs of cross bill for discovery only to be in the discretion of the Court.

That where a defendant in equity files a cross bill against the plaintiff in equity for discovery only, the costs of such bill, and of the answer thereto, shall be in the discretion of the Court at the hearing of the original cause.

### XLII.

Answer to such cross bill how to be read and used.

That where a defendant in equity files a cross bill for discovery only against the plaintiff in equity, the answer to such cross bill may be read and used by the party filing such cross bill, in the same manner and under the



same restrictions as the answer to a bill praying relief may now be read and used.

### XLIII.

Exhibits provable *viva voce* may be proved by affidavit.

That in cases in which any exhibit may by the present practice of the Court be proved *viva voce* at the hearing of a cause, the same may be proved by the affidavit of the witness who would be competent to prove the same *viva voce* at the hearing.

### \*XLIV.

[\*381]

Defendant making default at the hearing, decree to be absolute at once.

That where a defendant makes default at the hearing of a cause, the decree shall be absolute in the first instance, without giving the defendant a day to show cause, and such decree shall have the same force and effect as if the same had been a decree *nisi* in the first instance, and afterwards made absolute in default of cause shown by the defendant.

### XLV.

Decrees in administration suits to contain inquiry as to personal estate outstanding.

That every decree for an account of the personal estate of a testator or intestate shall contain a direction to the Master to inquire and state to the Court what parts (if any) of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct.

### XLVI.

Interest from date of decree to be allowed out of surplus estate on debts not carrying interest.

That a creditor, whose debt does not carry interest, who shall come in and establish the same before the Master, under a decree or order in a suit, shall be entitled to interest upon his debt, at the rate of £4 per cent. from the date of the decree, out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest.

### XLVII.

Creditors to have costs of establishing their debts.

That a creditor who has come in and established his debt before the Master under a decree or order in a suit, shall be entitled to the costs of so establishing his debt, and the same shall be taxed by the Master, and added to the debt.

### XLVIII.

Affidavits, &c. not to be recited in Master's reports, but to be referred to and identified.

That in the reports made by the Masters of the Court, no part of any state of facts, charge, affidavit, \*deposition, examination, or an- [\*382] swer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the Court what state

of facts, charge, affidavit, deposition, examination or answer, were so brought in or used.

### XLIX.

Bills of revivor and supplement need not set forth the statements of the original pleadings.

That it shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the pleadings in the original suit, unless the special circumstances of the case may require it.

### L.

Petition of rehearing need not state proceedings anterior to decree.

That in any petition of rehearing of any decree or order made by any Judge of the Court, it shall not be necessary to state the proceedings anterior to the decree or order appealed from, or sought to be reheard.

### LI.

Orders to take effect from end of Michaelmas term 1841.

That the foregoing Orders shall take effect as to all suits, whether now depending, or hereafter commenced, on the last day of Michaelmas term, One thousand eight hundred and forty one.

COTTENHAM, C.  
LANGDALE, M. R.

AN  
INDEX  
TO  
THE PRINCIPAL MATTERS  
CONTAINED IN THIS VOLUME.

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**ACCOUNT.**  
*See SET OFF, 2.*

**ACQUIESCENCE.**  
*See NUISANCE.*

**ADMINISTRATOR.**  
*See PERSONAL REPRESENTATIVE.*

**ADVANCING CAUSES.**  
**PRINCIPLE OF THE COURT IN.** *Rawson v. Samuel, 181.*

**AFFIDAVIT.**  
*See PRACTICE, 4.*

**AGENT.**

. An objection to a bill by an incorporated railway company for specific performance of a contract, for the purchase of land, entered into by their agent that it did not appear that the agent was authorized under the corporate seal, and therefore that there was no mutuality, overruled, on the ground that the company had, before the bill was filed, not only acted on the contract by entering into possession of the land, but actually made a railroad over it. *London and Birmingham Railway Company v. Winter, 57.*  
*See MUNICIPAL CORPORATIONS. PLEADING, 2.*

**AMENDMENT.**  
*See PRACTICE, 3.*

**ANNUITY.**

A testator bequeathed to his wife 600*l.* per annum for her life, to be paid quarterly, and after her death the said annuity to be equally divided between six persons, whom he named, or the survivors or survivor of them. He also

gave to each of these six persons 100*l.* per annum during their lives, to be paid quarterly, with power to leave their said respective annuities at their deaths to any persons they might marry, or any children they might leave: but in case of any of them dying without exercising such power, then to the survivors or survivor. Held, reversing the decree below, that the gifts over of the annuities of 600*l.* and 100*l.* respectively were not gifts of so much stock in the three per cents. as would produce those annuities, but gifts of annuities for the respective lives only of the persons, to whom they were limited, as tenants in common. *Blewitt v. Roberts, 274.*

*See LUNATIC.*

**ANSWER.**  
*See PLEADING, 2, 3.*

**ASSIGNEE OF DEBT.**  
*See SET OFF, 1.*

**ASSIGNEES IN BANKRUPTCY.**  
*See SETTLEMENT, 1.*

**ATTORNEY GENERAL**

In an information the Attorney General, and not the relator, is the party prosecuting the cause: and, therefore, the court will not allow counsel for the relator to be heard in any other character than as counsel for the Attorney General. *Attorney General v. Ironmongers Company, 208.*

**AUTHORITY.**  
*See AGENT.*

**BANKRUPTCY.**  
*See INTEREST.*

**BREACH OF CONTRACT.**

See SET OFF, 2.

**BREACH OF INJUNCTION.**

See CONTEMPT.

**BREACH OF TRUST.**

Part of a sum of money which had been raised by a husband upon the security of property comprised in his marriage settlement, by means of a suppression of the settlement, was lent by him to the trustee of the settlement upon his bond, the trustee being ignorant of the means by which the money had been raised. After the death of the husband, the wife, who was entitled to a life interest in the settled property, with remainder to her children, took out administration to her husband, and filed a bill, in her own name and in the names of her children by herself as their next friend, against the trustee, who had in the mean time taken the benefit of the insolvent debtor's act, praying that the sum due upon the bond (which the widow, as administratrix, offered to deliver up) might be replaced, with interest, upon the trusts of the settlement. Held, that the widow and children had a clear equity to follow the money in the hands of the trustee, and that they would have had the same equity if, instead of being a trustee, he had been a stranger; and *semble*, that such a claim would not have been barred by the trustee's discharge under the insolvent debtors' act, even if it had been proved (which it was not) that the bond had been included in his schedule. *Buckridge v. Glasse*, 126.

See MUNICIPAL CORPORATION. PARTIES, 1.

**CHARITY.**

A testator gave the residue of his estate to an incorporated company in the city of London, upon trust to apply one moiety of the income to the redemption of British slaves in Turkey or Barbary, one-fourth part to the support of charity schools in the city and suburbs of London, where the education was according to the church of England, not giving to any one above 20*l.* a year; and in consideration of the company's care and pains in the execution of his will, out of the remaining fourth part to pay 10*l.* a year to such minister of the church of England as should from time to time officiate in their hospital, and the rest to necessitated decayed freemen of the company, their widows and children, not exceeding 10*l.* a year to any family. And the testator positively forbade his trustees to diminish the capital by giving away any part of it, or to apply the income to any use or uses but those mentioned in his will. The income of a moiety of the residue having for several years been suffered to accumulate in consequence of there being no British captives in Turkey or Barbary, an information was filed for the administration of the charity estate, including the accumulations of that moiety. And it appearing that there were then no such British slaves to be redeemed, and no other object having

been suggested which, in the opinion of the court, bore any resemblance to the redemption of such slaves, it was declared that, after setting apart a certain sum out of that moiety and its accumulations, to provide a fund for the redemption of any British subjects who might thereafter be held in slavery in Turkey or Barbary, the income of the surplus of that moiety and its accumulations ought to be applied in supporting and assisting charity schools in England and Wales, where the education was according to the church of England, but not to an amount of more than 20*l.* per year to any one school; and it was referred back to the master to settle and approve a scheme for that purpose. *Attorney General v. Ironmongers Company*, 208.

**CHOSE IN ACTION.**

See VOLUNTARY SETTLEMENT, 2.

**CHURCH RATE.**

Whether the stat. 53 G. 3, c. 127, s. 7, which gives power to a justice to enforce the payment of a sum under 10*l.* due upon a church rate, where neither the validity of the rate nor the liability of the party has been questioned, takes away the jurisdiction of the Ecclesiastical Courts in such cases, *quære*.

But assuming that it does, it seems that it is still competent to institute a suit in that court for payment of a sum under 10*l.* due upon a church rate, because, until the defendant has appeared in such a suit, there may be no means of knowing whether the validity or liability is in dispute or not. Therefore, where a *significavit*, as recited in the return to a writ of *habeas corpus*, stated that the prisoner had been pronounced guilty of contumacy, for non-payment of a sum of 2*l.* 5*s.* to certain churchwardens with their costs of suit, pursuant to a monition duly issued in a certain cause of subtraction of church rate, the proceedings wherein were carried on in pain of the contumacy of the prisoner, who, though duly cited with the usual intimation, had not appeared; an objection that the cause was not sufficiently described for want of an averment that the validity of the rate or the liability of the party were in dispute, was overruled. *In re Baines*, 31.

**CONSTRUCTION.**

See ANNUITY. LEGACY. MAINTENANCE. SETTLEMENT.

**CONTEMPT.**

1. A party who has notice of an order of the court is bound by it from the time the order is pronounced, and if the order be for an injunction, and the party after notice be guilty of a breach of it, he may be committed for the contempt without the production of the writ of injunction, and although the writ have not actually issued. *M'Neil v. Garrett*, 98.
2. It appearing upon a motion to take the bill *pro confesso* against a defendant who was in custody under an attachment for want of an

answer, that the time for making it had expired; the court not only refused the motion, but forthwith discharged the prisoner out of custody without paying any of the costs of his contempt. *Collins v. Collyer*, 262.

3. A defendant originally committed to prison under an attachment for not appearing to the bill, remained there without applying for his discharge, after he had by the default of the plaintiff become entitled to be discharged without paying any of the costs of his contempt. While he so remained in prison, the plaintiff lodged an attachment against him for want of an answer: Held, that, under these circumstances, the attachment could not operate as a valid detainer; and, therefore, upon the subsequent application of the prisoner, he was discharged, without paying any of the costs of his contempt. *Lewis v. Evans*, 264.

#### CONTRIBUTION.

See PARTIES, 1.

#### COPYHOLD.

See VOLUNTARY SETTLEMENT, 1.

#### CORPORATE OFFICER.

See MUNICIPAL CORPORATION.

#### COSTS.

1. A residuary gift in a will is a gift of all that shall remain after payment of debts and legacies, and the expenses incident to the execution of the will. And therefore, where a testator gave his residuary estate, both real and personal, upon trust to be divided in certain proportions among certain classes of persons, although some of the classes turned out to be much more numerous than others, it was held that the costs of establishing the claims of the individuals composing the different classes were not to be paid exclusively out of the portions attributable to such classes respectively, but that the costs of all the persons who established their claims as falling within the several classes were to be paid indiscriminately out of the residuary fund before any apportionment of it took place. *Skuttleworth v. Howarth*, 228.
2. Where one part of a motion is of course, and the other part is contested and refused, the court, although it grants that part which is of course, will order the party moving to pay the costs of the motion. *Murray v. Walter*, 114.

See LUNATIC MORTGAGEE, 1. TRAVERSE.

#### COVENANT.

See SETTLEMENT. VOLUNTARY SETTLEMENT, 1.

#### CROSS EXAMINATION.

See SPECIFIC PERFORMANCE.

#### CY PRES.

See CHARITY.

#### DAMAGES

See SET OFF, 2.

#### DE CONTUMACE CAPIENDO.

*Semble*, that the indorsement upon a writ de contumace capiendo need not show that all the formalities prescribed by the act 5 Eliz. c. 23, have been complied with. *In re Baines*, 31.

#### DEMURRER.

See NUISANCE.

#### DISCHARGE OF PRISONER.

See CONTEMPT, 2, 3.

#### DISCOVERY.

See PLEADING, 2.

#### DISMISSING BILL.

See PRACTICE, 2.

#### DISTRIBUTION OF RESIDUE.

See COSTS.

#### ECCLESIASTICAL COURT.

See CHURCH RATE. HABEAS CORPUS.

#### ELECTION.

Where a party claiming to be entitled to real estate, but being uncertain whether his title was a legal or an equitable one, was proceeding for the recovery of it by action at law and bill in equity at the same time: Held that he was bound to elect either to suspend his proceedings at law or to have his bill dismissed, although the relief prayed by the bill, embracing an account of rents and a delivery of the title deeds, was more extensive than that which was sought by the action.

Where a party is proceeding at law and in equity at the same time for the same cause of suit, the court has no discretion to retain the suit if the plaintiff proceed with his action, except in cases where the proceeding at law is ancillary, to that in equity, in which cases the court has the power to mould the proceedings with a view to its own decree, and for that purpose may allow the action to proceed, retaining the bill in the mean time. *Royle v. Wynne*, 252.

#### ELEGIT.

Whether a court of equity will interfere in favor of an equitable mortgagee against tenant by *elegit*, who has got possession of the land without notice of the mortgage, under a judgment obtained against the mortgagor subsequently to the mortgage; *Quære?* *Whitworth v. Gainsain*, 325.

#### ENCOURAGEMENT OF NUISANCE.

See NUISANCE.

#### ENQUIRY.

See PLEADING, 6. SPECIFIC PERFORMANCE.

#### EQUITABLE MORTGAGE.

See ELEGIT.

#### EXECUTOR.

See PERSONAL REPRESENTATIVE.

**EXHIBITS.***See PRACTICE, 7.***FATHER'S ABILITY.***See MAINTENANCE, 2.***FEME COVERT.***See MARRIED WOMAN.***FOLLOWING TRUST MONEY.***See BREACH OF TRUST.***GENERAL ORDERS.***See PRACTICE, 1, 2, 3, 4.***HABEAS CORPUS.**

The object of the control which this court has over the Ecclesiastical Courts by means of the writ of *habeas corpus*, is to keep those courts within the jurisdiction which the law has assigned to them, and not to correct any error into which they may fall in the exercise of it. And, therefore, objections taken to a *significavit* upon the ground that it did not sufficiently show that the defendant had been regularly cited, and upon the further ground, that the Ecclesiastical Court was not, according to its own practice, authorized to proceed to judgment upon the merits, against a party who had never appeared, were overruled. *In re Baines*, 31.

**IMPERTINENCE.***See PLEADING, 3.***INJUNCTION.**

1. Where parties, in possession of an easement, filed a bill to restrain the owner of the land from proceeding with an action of trespass, alleging three grounds of defence to the action, two of which were legal, and one equitable, this court allowed the action to proceed to judgment, inasmuch as if the legal grounds of defence should be sustained, the interposition of this court would be unnecessary, and if they should not be sustained, and if it should therefore become necessary to entertain the equitable question, this court would know what amount of damages a jury had assessed as a compensation for the easement, and be enabled to secure that amount until the hearing of the cause. *Barnard v. Wallis*, 85.
2. An injunction to restrain the working of valuable mines refused, under the circumstances, on condition of the defendant's making certain admissions for the purpose of enabling the plaintiff to bring an action, although there was reason to apprehend that if the working was continued, the plaintiff's houses upon the surface would be totally destroyed or irreparably damaged before the legal right could be decided. *Hilton v. The Earl of Granville*, 283.
3. The object of the interference of a court of equity, by interlocutory injunction, between two parties who are at issue upon a legal right, is solely the protection of the property in dispute until the legal right shall have been ascertained: and, therefore, such an injunction

ought always to be accompanied by a provision for putting the question into a course of speedy investigation at law. *Harman v. Jones*, 299.

*Semble.* The court will, in no case, interfere, upon an interlocutory application, to prevent a party from enforcing a legal right, without putting the party applying upon such terms as will enable the court to do justice to the party restrained, in the event of the plaintiff in equity failing to make out a case for equitable relief at the hearing. *Sanxter v. Foster*, 302.

*See CONTEMPT. INTERPLEADER. NUISANCE. SET OFF.*

**INQUISITION.***See TRAVERSE.***INSOLVENT DEBTORS ACT.**

*See BREACH OF TRUST. VOLUNTARY SETTLEMENT, 2.*

**INSUFFICIENCY.***See PLEADING, 2.***INTEREST.**

Where one of two obligors in a joint and several bond had become bankrupt, and the obligee having by several dividends in the bankruptcy been paid 20s. in the pound upon the amount of principal and interest due at the date of the commission, also carried in a claim in respect of the same bond under a decree in a suit for the administration of the estate of the co-obligor, who had died: Held, that the amount due to the obligee, in respect of such claim, was to be computed by treating the dividends as ordinary payments on account, that is, by applying each dividend, in the first place, to the payment of the interest due at the date of such dividend, and the surplus, if any, in reduction of the principal; and *semble*, the same principle of computation is applicable in bankruptcy as between the bankrupt and creditors, where there is a surplus of the estate after payment of 20s. in the pound upon all the debts proved. *Bower v. Morris*, 351.

**INTERPLEADER.**

1. Where one of the defendants to a bill of interpleader insists that the effect of some act of the plaintiff is to deprive him, as against that defendant, of the right which he would otherwise have to treat the case as one of interpleader, the court will not, on that account, refuse an injunction, unless it be satisfied either that the act relied on has the effect which the defendant attributes to it, or at least that the question, whether it has that effect or not, is a real and substantial question to be tried.

And therefore, where a tenant filed a bill of interpleader against two sets of persons who claimed to be respectively devisees and co-heirs of his original landlord, an injunction was granted to stay proceedings at law by one of the parties for the recovery of rent, on payment of the rent due, into court, although it appeared that the plaintiff had, by a memo-



randum in writing, acknowledged the title of that party, and paid rent to him for nearly two years after the original landlord's death, such acknowledgment and payment appearing to have been made in ignorance of his title being disputed. *Jew v. Wood*, 185.

2. Where a fund in the hands of a stakeholder was contested by three parties, one of whom claimed the whole of it, and the other two claimed it in certain proportions; and the stakeholder filed a bill of interpleader against the three claimants, the court, at the hearing, dismissed the bill with costs, as against one of the parties claiming a part of the fund, and decreed that the other two parties should interplead as to the other part. *Hoggart v. Cutts*, 197.

### JURISDICTION.

See NUISANCE. LUNATIC MORTGAGEE.

### LANDLORD AND TENANT.

See INTERPLEADER, 1.

### LEGACY.

A testator by his will, bequeathed to his executors and trustees all the East India stock which should be standing in his name at his death, upon trust to accumulate the dividends until D. W. V. should attain twenty-five, and then to transfer the principal, together with such accumulations, to D. W. V., his executors, administrators, or assigns absolutely. The will contained also a residuary bequest. The testator had 2000*l.* East India stock standing in his name at his death. Held, that D. W. V. took an immediate vested interest in that legacy, although he was a minor at the testator's death, and, accordingly, the court ordered the stock, with its accumulations, to be transferred to him on his attaining twenty-one. *Saunders v. Vautier*, 240.

### LENGTH OF TIME.

See PRACTICE, 5.

### LIEN.

See SOLICITOR.

### LUNATIC.

An annuity allowed out of the income of the lunatic's estate, as a retiring pension to an old personal servant of the lunatic, who was obliged to retire from his service by reason of his age and infirmity. *In the matter of the Earl of Carysfort*, 76.

See TRAVERSE.

### LUNATIC MORTGAGEE.

1. *Semble*: The expenses of proceedings under the 11 G. 4, & 1 W. 4, c. 60, s. 5, for the purpose of obtaining a reconveyance of a mortgaged estate from a mortgagee of unsound mind, but not found such by inquisition, are to be borne by the mortgagor. *In the matter of Marrow*, 142.
2. The summary jurisdiction given to the Lord Chancellor by the 11 G. 4, & 1 W. 4, c. 60, s.

5, for the conveyance or transfer of property vested in persons as trustees or mortgagees who are lunatic, but not found such by inquisition, does not apply to cases in which the fact of lunacy is contested. *In the matter of Walker*, 147.

### MAINTENANCE.

1. *Semble*. The existence of an order for the maintenance of an infant out of the income of a fund, does not prevent the court, in a subsequent proceeding in which the title to the principal comes directly in question, from making an order negating the infant's title to the fund. *Saunders v. Vautier*, 240.
2. *Semble*: Where, in a marriage settlement, the wife's property is settled upon herself for life, for her separate use, with remainder to her children, and a mere power is given to the trustees to apply the income of the property towards the maintenance and education of the children; the father will not be entitled to require that any part of the income shall be applied to the maintenance of the children, so long as he is himself of ability to maintain them. *Thomson v. Griffin*, 317.

### MARRIAGE SETTLEMENT.

See SETTLEMENT.

### MARRIED WOMAN.

The general engagements of a married woman are enforced by a court of equity against her separate estate, not as executions of a power of appointment, but on the principle that to whatever extent she has, by the terms of the settlement, the power of dealing with her separate property, she has also the other power incident to property in general, namely, the power of contracting debts to be paid out of it.

Where a married woman whose real estate was settled, on her marriage, to such uses as she should, by any deed or instrument in writing, attested by one witness, or by her will, appoint, and in default of appointment, upon trust for her sole and separate use for life, with remainder over, made her will in pursuance of the power, and thereby charged her real estate with payment of her debts: It was held that this was a good charge on the real estate of all her written engagements; and, *semble*, also, of her debts generally, whether evidenced by writing or not.

Held, also, that the proper form of a decree in a suit by a holder of her written engagement, on behalf of himself and all other creditors, for payment of their debts out of the real estate, was an inquiry what debts there were to be paid under the provisions of the will; and that the plaintiff must, therefore, prove his debt over again before the master. *Owens v. Dickenson*, 48.

### MINES.

See INJUNCTION, 2.

### MISJOINDER.

The principle that parties, though entitled to re-

tering such appearance shall be entitled to be served with notice of all proceedings in the cause, and to appear thereon. But the costs occasioned thereby shall be paid by the party entering such appearance, unless the Court shall otherwise direct.

### XXVIII.

Special appearance not to be entered after the usual time without leave.

That a party shall not be at liberty to enter such special appearance under the Twenty-seventh Order, after the time limited by the practice of the Court for appearing to a bill in the ordinary course, without first obtaining an order of the Court for that purpose; such order to be obtained on notice to the plaintiff, and the party so entering such special appearance, shall be bound by all the proceedings in the cause, prior to such special appearance being so entered.

### XXIX.

Plaintiff prosecuting suit against such defendant in ordinary way, liable to costs occasioned thereby.

That where no account, payment, conveyance, or other relief is sought against a party, but the plaintiff shall require such party to appear to and answer the bill, the costs occasioned by the plaintiff having required such party so to appear and answer the bill and the costs of all proceedings consequential thereon, shall be \*paid by the plaintiff, unless the Court shall otherwise direct.

### XXX.

Devises in trust with power to sell and give receipts, to represent *cestui que trust* in like manner as executors in case of personal estate.

That in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the Court may upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

### XXXI.

Heir not necessary party to suits to execute trusts of will, unless will is to be established.

That in suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

**XXXII.**

One or more of parties jointly and severally liable, may be sued alone.

That in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

**\*XXXIII.**

[\*378]

On demurrer or plea being overruled, plaintiff may file traversing note.

That where a demurrer or plea to the whole bill shall be overruled, the plaintiff, if he does not require an answer, shall be at liberty immediately to file his note in manner directed by the Twenty-first Order, and with the same effect, unless the Court shall, upon overruling such demurrer or plea, give time to the defendant to plead, answer, or demur; and in such case, if the defendant shall file no plea, answer, or demurrer, within the time so allowed by the Court, the plaintiff, if he does not require an answer, shall, on the expiration of such time, be at liberty to file such note.

**XXXIV.**

Demurrer to be held sufficient, unless set down by plaintiff within certain time.

That where the defendant shall file a demurrer to the whole bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within twelve days from the expiration of the time allowed to the defendant for filing such demurrer, cause the same to be set down for argument: and where the demurrer is to part of the bill the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within three weeks from the expiration of the time allowed for filing such last mentioned demurrer, cause the same to be set down for argument.

**XXXV.**

Plea to be held well pleaded, unless set down by plaintiff within certain time.

That where the defendant shall file a plea to the whole or part of a bill, the plea shall be held good to the same extent and for the same purposes as a plea allowed upon argument, unless the plaintiff shall, within three weeks from the expiration of the time allowed for filing such plea, cause the same to be set down for argument, and the plaintiff shall be held to have submitted thereto.

**\*XXXVI.**

[\*379]

No demurrer or plea to be disallowed for covering too little.

That no demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to it.

**XXXVII.**

No demurrer or plea to be disallowed for being covered by answer.

That no demurrer or plea shall be held bad and overruled upon argument,

Ref upon the merits, cannot obtain it in a suit in which they associated with co-plaintiffs who are not so entitled, ought not to be so intended as to make it necessary that every plaintiff should be interested in and entitled to every part of the relief prayed. *Buckeridge v. Glasse*, 136.

#### MULTIFARIOUSNESS.

See INTERPLEADER, 2.

#### MUNICIPAL CORPORATION.

A corporation may institute a suit for setting aside transactions fraudulent against it, although carried into effect in its name by members of the governing body; and that right is not affected by the Attorney General having also power to call in question such transactions.

The members of the governing body are the agents of a corporation; and if they exercise their functions for the purpose of injuring its interests, and alienating its property, they are personally liable for any loss occasioned thereby. *Attorney General v. Wilson*, 1.

See PARTIES.

#### MUTUALITY.

See AGENT.

#### NEW ORDERS OF AUGUST, 1841, 366.

#### NOTICE.

See CONTEMPT. ELEGIT.

#### NUISANCE.

A party may so encourage another in the erection of a nuisance, as to give the adverse party an equity to restrain him from recovering damages at law for such nuisance when completed.

In a bill filed for that purpose, a general allegation, that the defendant encouraged the erection of the nuisance while it was in progress, is sufficient to let in evidence of particular acts of encouragement as will sustain the equity, and consequently is sufficient to prevent a demurrer.

What degree of encouragement or what circumstance, leading to encouragement, would be sufficient for that purpose, *quære*? *Williams v. Earl of Jersey*, 91.

#### PAROL VARIATION OF WRITTEN CONTRACT.

See SPECIFIC PERFORMANCE.

#### PARTIES.

1. Where a liability arises from the wrongful act of several parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. *Attorney General v. Wilson*, 1.
2. In order to enable the court to adjudicate upon the right to a residue of personal estate as between the next of kin as a class and a party claiming under a will, it is not necessary that

all the next of kin should be present, provided the court be satisfied that some of them are parties to the record. *Caldecott v. Caldecott*, 183.

See ATTORNEY GENERAL. MISJOINDER. PERSONAL REPRESENTATIVE. PLEADING, 2. PRACTICE, 6.

#### PARTNERSHIP.

See PLEADING, 2. PRODUCTION.

#### PAYMENT INTO COURT.

See PERSONAL REPRESENTATIVE.

#### PERSONAL REPRESENTATIVE.

A party beneficially entitled to one-fourth of a fund belonging to the estate of a testator who had been dead 150 years, having obtained letters of administration *de bonis non* to the testator, filed a bill for an account and payment of the whole fund. It appearing that no part of the fund in question was required for the payment of the testator's debts, but that the beneficial interest in the other three-fourths had passed under the residuary bequest in his will, and had belonged successively to the estates of several persons who were named in the proceedings, but who were not represented on the record, the court ordered one-fourth only to be paid to the plaintiff, and the other three fourths to be paid into court, with liberty to any party interested to apply, giving notice to the Attorney General. *Loy v. Duckett*, 305.

#### PLEADING.

1. Where cross demands exist between two parties, one of whom is proceeding by an action at law, and the other by a suit in equity for an account and payment, the court of equity, although it may be of opinion that the facts of the case entitled the plaintiff in equity to have one demand set off against the other, will not give that relief, unless it has been distinctly prayed by the bill. *Rawson v. Samuel*, 161.
2. A lease of mines was made to four persons, nominally as individuals, but really as trustees for a mining company, reserving to the lessor a certain proportion of the net profits of working the mines. A bill having been filed by the executors of the lessor against the three surviving lessees, who were also shareholders and directors of the company, for an account, the defendants in their answer to that part of the bill which sought a discovery of the mines that had been opened and worked under the lease, of the moneys expended and received in working them, and of the documents in the possession of the defendants or their agents relating to the matters in question, after stating what they personally knew of the matters inquired after, and setting forth a list of all the documents in the possession of themselves or their agents, proceeded to state that there were other documents in the custody of the agents of the association, but who were not their agents personally, containing all the information that could be obtained about the matters in question, but that the defendants had no

power to use those documents except when sitting at the board of directors, or by an order of the board, and that they believe the directors declined to allow them to use the same, or to afford them any information which would assist the plaintiffs in prosecuting the suit until all the other shareholders should have been made parties. Held, this answer was insufficient, by reason of its not stating that the defendants had applied to the board of directors for leave to procure and give the information required, and that they had been refused. *Taylor v. Rundell*, 104.

3. Trustees of real estates having, in a schedule to their answer to a bill for an account of the trust estates, set forth the minute particulars of the different estates with undue prolixity and diffuseness, a general exception to the schedule, as being impertinently set forth, was allowed by the master, and an exception to his report was overruled by the court, although it appeared that there were a few passages in the in the schedule which were not liable to that objection. *Hyde v. Masterman*, 265.
4. The bill, stating the title of the plaintiffs as equitable mortgagees by deposit of deeds, and that certain persons represented by the defendants had got possession of the mortgaged estates under *elegits* sued out by them in concert with the mortgagor, upon judgments obtained subsequently to the date of the equitable mortgage, in the names of those parties, but at the instance of the mortgagor, and for fictitious debts, prayed that the plaintiffs might be declared entitled as equitable mortgagees to priority over the *elegits* and the judgments so obtained, and that such judgments and *elegits* might be declared fraudulent and void as against the plaintiffs, and that the mortgage security might be realized, and the proceeds paid to the plaintiffs towards satisfaction of their debt, and that a receiver might be appointed, and the defendants restrained from receiving the rents of the mortgaged premises, and also from permitting the mortgagor to receive them. An order for a receiver, which had been made by the Vice-Chancellor, was discharged, upon appeal, by the Lord Chancellor, his lordship being of opinion that the charges of fraud and collusion were not made out against the parties who had obtained possession under the *elegits*, and that the question whether the plaintiffs were entitled to priority over the defendants, independently of these charges, was not open to them in the present state of the record, inasmuch as it was clear, from the frame of the bill, that the claim of the plaintiffs did not profess to be founded upon any such ground. *Whitworth v. Gaugain*, 325.

See PERSONAL REPRESENTATIVE.

#### POWER.

See MAINTENANCE, 2. MARRIED WOMAN.

#### PRACTICE.

1. The 45th general order of April, 1828, only enables the court to supply something which may make an existing direction complete, and

not to make a new direction; therefore, where a decree had directed an account of the real estates of a testator sold since his death, and of those which remained unsold, but had omitted to direct an account of the proceeds of such estates as had been sold: Held that such omission could not be supplied upon petition, under that order. *Whitehead v. North*, 78.

2. The 56th general order of April, 1828, applies only to proceedings in the master's office; and therefore a plaintiff, from whom the master has taken the conduct of the suit under that order is not thereby precluded from afterwards making an application to the court, in the suit. 78.
3. The plaintiff neglected to obtain an order for a commission to examine witnesses, until after the expiration of three weeks from the time of filing the replication, when he obtained an order for that purpose, *ex parte*: Held, that the defendant's proper course was not to move to dismiss the bill for want of prosecution, but to move to discharge the order for a commission. *Strickland v. Strickland*, 151.
4. That part of the 10th order of December, 1833, which provides that in every cause for an injunction to stay proceedings at law if the defendant do not plead, answer, or demur to the plaintiff's bill within eight days after appearance, the plaintiff shall be entitled, as of course upon motion, to such injunction, includes amended bills as well as others. And the 3d order of May, 1839, which requires that applications for an injunction upon amended bills shall, in certain cases, be supported by an affidavit of the truth of the amendments, relates only to cases in which the injunction is applied for upon amendments made in the bill after an answer to it has been put in. And therefore, when the bill has been amended before answer, the plaintiff may obtain an injunction under the provisions of the 10th order without any affidavit of the truth of the amendments. *Brooks v. Purton*, 233.
5. The plaintiff in a creditor's suit having taken the bill *pro confesso* against one of the defendants, who was the executor, adduced no evidence of his debt as against the other defendants, (who were the devisees of the testator's real estate, and who did not admit the debt,) except an examined copy of the judgment which the plaintiff had recovered for it at law against the executor. The court, under the circumstances, refused leave to supply the defect in the evidence at the hearing, and dismissed the bill, as against the devisees, with costs. *Marten v. Whichelo*, 257.
6. *Semble*: Where it appears, at the hearing of a cause, that the effect of the plaintiff's having unnecessarily made a person a party defendant to the suit has been to deprive another defendant of his evidence on a material point, the court will not make a decree against such other defendant without first putting the matter into a course of inquiry in which he may have the benefit of the evidence of which he has been so deprived. *Cotman v. Orton*, 304.
7. A motion for leave to prove *viva voce*, upon a rehearing, exhibits which were not in evidence upon the original hearing, does not require notice. *Herring v. Clobery*, 251.



8. A defendant who has allowed a decree nisi to be made absolute against him by not appearing to show cause against it, is not entitled, as of course, to a rehearing, and therefore it is irregular to obtain an order to rehear the cause upon the common petition; the proper course is, to present a special petition, praying that the order making the decree absolute may be discharged, and that the party may be at liberty to show cause against the decree. *Booth v. Creswicke*, 361.

See ATTORNEY GENERAL. CONTEMPT. ELECTION.  
PERSONAL REPRESENTATIVE. SCHEME.

### PRIORITY.

See ELEGIT.

### PRODUCTION OF DOCUMENTS.

The defendant, by his answer, stated that certain books relating to a concern in which the plaintiff claimed to be a partner with the defendant were in the possession of the treasurer of the concern on behalf of the several shareholders in it, many of whom were not parties to the suit: Held, that the defendant could not be ordered to produce the books in question. *Murray v. Walter*, 114.

### REHEARING.

See PRACTICE, 8.

### RELATOR.

See ATTORNEY GENERAL.

### SCHEDULE.

See PLEADING, 2.

### SCHEME.

Under a reference to approve a scheme for the application of charity funds, the master has no authority to allow, still less to invite any person to intervene in the inquiry, who is not a party to the cause. If any such person is desirous of proposing a scheme of his own, his proper and only course is to apply to the court for leave so to do. *Attorney General v. Ironmongers Company*, 208.

### SEPARATE PROPERTY.

See MARRIED WOMAN.

### SET OFF.

1. Where there are cross demands between two parties of such a nature that, if both were recoverable at law, they would be the subject of legal set-off then, if either of the demands is matter of equitable jurisdiction, the set-off will be enforced in equity. *Clark v. Cort*, 154.
2. Equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient. Still less will the court interfere, on the ground of equitable set-off, to prevent a party from recovering a sum awarded to him by a jury as damages for a breach of contract, merely because there is an unsettled account pending between him

and the party against whom the action is brought, although the subject matter of the account consist of dealings and transactions arising out of the contract, the breach of which is the subject of the action. *Rawson v. Samuel*, 161.

### SETTLEMENT.

By a marriage settlement, after reciting that the intended wife was possessed of 1500*l.* which the husband was to have for his own use as soon as the marriage should take effect, and that she had also a vested interest in the real and residuary personal estate of a testator, amounting to the sum of 32,000*l.* and upwards, which would be equally divided amongst eight children, of whom she was one, on the death of a tenant for life, it was witnessed that in consideration of the intended marriage and of the sum of 1500*l.* then in the possession of the intended wife, and also of the said vested interest of the value of 4000*l.* and upwards, the husband covenanted that his heirs, executors, and administrators should, immediately after his decease, pay to the trustees of the settlement the sum of 4000*l.* to be held upon certain trusts for the wife and the children of the marriage; but the deed contained a proviso, that the heirs, executors, or administrators of the husband should pay all other debts which the husband should owe at his death in preference to the 4000*l.*, and that they should not be bound to pay the 4000*l.* unless the assets of the husband should be more than sufficient to pay all his other debts. The husband became a bankrupt before the death of the tenant for life, but he survived the tenant for life and afterwards died before the wife's share was actually paid.

*Semble*: the husband's covenant did not operate as a purchase of the wife's reversionary share under the will: but

Held, that at all events the husband's assignees were not entitled to receive the share without performing the covenant. *Corsbie v. Free*, 64.

See MAINTENANCE, 2. VOLUNTARY SETTLEMENT.

### SIGNIFICAVIT.

See CHURCH RATE. HABEAS CORPUS.

### SOLICITOR.

The lien of a solicitor on the papers of his client for the amount of his bill is equivalent to a contract; and, therefore, a solicitor will not be ordered to deliver up such papers until he is actually paid; and *semble*, that payment into court of a sum of money, is not sufficient to entitle the client to demand the papers; but *semble*, also, that if the solicitor's withholding a document would occasion the loss of the property to which it relates, the court will make such an order as, without prejudicing the solicitor's lien, will allow of the document's being made available for the purpose of securing the property. *Richards v. Platel*, 79.



**SPECIFIC PERFORMANCE.**

In a suit for specific performance of a written agreement, a parol variation not set up by the answer, but coming out on the cross examination of the defendant's agent, who was one of the plaintiff's witnesses, is a proper subject for inquiry before the court finally disposes of the case. *Semble*.

But the plaintiff consenting to adopt it as part of the contract, a specific performance of the contract with the parol variation was decreed immediately with costs. *London and Birmingham Railway Company v. Winter*, 57.

*See* AGENT.

**SURPLUS ESTATE.**

*See* INTEREST.

**TRAVERSE.**

Leave to traverse an inquisition of lunacy, if applied for by the party himself, who has been found a lunatic, is matter of right.

But, *semble*, The allowance of a sum of money out of the estate of the party so found lunatic, towards defraying the expense of the traverse, is subject to the Lord Chancellor's discretion. *In the Matter of John Bridge*, 38.

**VESTING.**

*See* LEGACY.

**VOLUNTARY SETTLEMENT.**

1. A father having, by a voluntary settlement, conveyed certain freehold, and covenanted to surrender certain copyhold, estates to trustees in trust for the benefit of his daughters, afterwards devised part of the same estates to his widow, who, after his death, was admitted to some of the copyholds. A suit having been instituted by the daughters to have the trusts of the settlement carried into effect, and to compel the widow to surrender the copyholds to which she had been admitted, a decree was made for carrying into effect the trusts as far as they related to the freeholds, the plaintiffs' title to them being complete; but as to the copyholds, the bill was dismissed with costs. *Jefferys v. Jefferys*, 138.
2. A voluntary alienation of property by a party who, at the time of such alienation, was insolvent, may be set aside in a suit by his assignees, subsequently appointed under the insolvent debtors' act, although the subject of such alienation be a chose in action. *Norcutt v. Dodd*, 100.













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